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ALEXANDER L. STEVAS,
CLERK

(10)

No. 84-127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 24, 1984
CERTIORARI GRANTED OCTOBER 15, 1984

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Relevant Docket Entries in the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5039

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, et al.

JAMES G. BUTLER, NICHOLAS R. ALLIS and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Appellants,

v.

RICHARDSON-MERRELL, INC., a Delaware Corporation,

Appellee.

DATE	FILINGS—PROCEEDINGS
01-23-84	Copy of notice of appeal and docket entries from Clerk, District Court.
01-23-84	Appellants' emergency motion for stay of all proceedings pending appeal of order disqualifying trial attorneys.
01-25-84	Appellee's opposition to appellants' motion for stay.
01-27-84	Per curiam order that appellants' emergency motion for stay of proceedings pending appeal of order disqualifying certain trial attorneys and request for expedited consideration of appeal is granted and further proceedings in the District Court are stayed pending further order of this Court; and that appellants' request for expedited appeal is granted and the Clerk is

DATE	FILINGS—PROCEEDINGS
	directed to schedule argument during the March 1984 sitting period of the Court. • • • •
03-01-84	Appellee's suggestion of issue regarding jurisdiction
03-07-84	Appellants' response to appellee's suggestion of issue regarding jurisdiction
03-09-84	Clerk's order, sua sponte, that counsel for the parties herein shall file, in typewritten form not to exceed ten pages, memoranda dealing with appealability of an attorney disqualification order in light of holding of the Supreme Court of the United States in Flanagan v. United States. • • • •
03-19-84	Appellants' memorandum on the question of appellate jurisdiction pursuant to 03-09-84 order
03-19-84	Appellee's memorandum concerning appellate jurisdiction pursuant to 03-09-84 order
03-22-84	ARGUED before Wald and Mikva, CJs and USDC Judge Charles R. Richey
05-29-84	Opinion for the Court filed by Circuit Judge Wald.
05-29-84	Concurring opinion filed by District Judge Richey.
05-29-84	Judgment by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is remanded with instructions to reinstate the pro hac vice appearances of plaintiffs' counsel, all in accordance with the Opinion for the Court filed herein this date.

DATE	FILINGS—PROCEEDINGS
06-28-84	Appellee's (Richardson-Merrell) petition for rehearing and suggestion for rehearing en banc
07-16-84	Per curiam order, sua sponte, that the Opinion of the Court filed on May 29, 1984, is amended as follows: (SEE ORDER for amendment); Wald and Mikva, CJs and USDC Judge Richey
07-17-84	Per curiam order, en banc, that the suggestion for rehearing en banc of appellees is denied; CJ Robinson, Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, CJs and USDC Judge Richey (Circuit Judge Wilkey did not participate in this Order)
07-17-84	Per curiam order that the petition for rehearing of appellees is denied; Wald and Mikva, CJs and USDC Judge Richey
07-24-84	Appellee's motion to stay issuance of the mandate pending decision on petition to the Supreme Court
07-30-84	Certified copy of order from Clerk, Supreme Court that petition for writ of certiorari was filed 07-24-84 in SC No. 84-127
08-02-84	Per curiam order that Defendant-Appellee's motion for stay of issuance of mandate is granted and the Clerk is directed not to issue the mandate herein for a period of 90 days from the date of this order; Wald and Mikva, CJs and USDC Judge Richey
10-17-84	Appellee's motion to extend stay of issuance of the mandate pending final disposition by the Supreme Court

DATE	FILINGS—PROCEEDINGS
10-19-84	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari on 10-15-84 in SC No. 84-127
10-24-84	Clerk's order that the Clerk is directed to stay the issuance of the mandate to a day seven days after a final disposition by the Supreme Court

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Relevant Docket Entries in the District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 80-1258

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, and JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC., a Delaware Corporation,

Defendant.

DATE	NR	PROCEEDINGS
1980		
May 19	1	COMPLAINT; appearance; jury demand.
1981		
Jan 26	13	APPEARANCE of James G. Butler as counsel for pltfs.

DATE	NR	PROCEEDINGS
1982		
Oct 19	438	APPEARANCE filed October 13, 1982 of Nicholas Allis, as counsel for pltfs.
Oct 20	444	ORDER filed 10-19-82 granting motion of deft to exclude testimony and evidence relating to thalidomide and Mer/29. * * * *
Dec 15	504	SUBMISSION OF PROPOSED TRIAL EXHIBITS of pltfs [sic].
Dec 15	505	LIST of deft of witnesses; exhibits A,B,C, and attachment 1.
Dec 15	506	STATEMENT of deft of qualifications and experience of expert witnesses; exhibit A.
Dec 15	507	STATEMENT of deft of facts to be proven.
Dec 15	508	FURTHER SUPPLEMENTAL of deft to their preliminary list of expert witnesses; exhibit 1.
Dec 15	509	EXHIBIT LIST of deft; exhibits A thru J.
Dec 15	510	QUESTIONS of deft for voir dire examination.
Dec 15	511	INITIAL PROPOSED JURY INSTRUCTIONS of deft.
Dec 15	512	DESIGNATIONS of deft of deposition transcripts for use at trial.
Dec 15	513	STATEMENT of deft of legal contentions; appendix.
Dec 15	514	PROPOSED VOIR DIRE QUESTIONS of pltfs to prospective jurors.
Dec 15	515	SUBMISSION of pltfs of proposed jury instructions; appendix 2.
Dec 15	516	SUBMISSION of pltf of deposition and trial testimony to be read into evidence; exhibit A.

DATE	NR	PROCEEDINGS
Dec 15	517	SUBMISSION of pltf of expert and fact witnesses; exhibit A and B.
Dec 23	538	MOTION by Pltffs. seeking modification of Court's pre-trial order; P&A's.
Dec 27	540	AFFIDAVIT of James G. Butler in support of Motion seeking modification of Court's Pre-trial Order.
Dec 27	544	ORDER filed Dec. 23, 1983, setting case for pretrial conference on 1-11-83 at 10:00 A.M. and directing parties to file a pretrial statement by noon on 1-10-83. • • • •
Dec 29	546	MOTION by deft. for permission to take additional and expedited discovery [re: Janowski] • • • •; Affidavit of Ogden N. Lewis; Exhibits A through I; Memo; Table of Authorities.
1983		
Jan 3	561	TRIAL BRIEF by deft. • • • •
Jan 4	563	ORDER filed 12-30-82 denying pltffs' motion for modification of the Court's Pretrial Order. • • • •
Jan 4	565	ORDER filed Jan. 3, 1983 that deft. may forthwith take the depositions of Krystyna Janowski and the father of her child. • • • •
Jan 5	567	TRIAL MEMORANDUM by Pltffs; Table of Contents; Table of Authorities; Exhibits A through F.
Jan 7	569	MOTION by Pltffs. for expedited hearing on motion to disqualify counsel for witness because of conflict of interest; P&A's.

DATE	NR	PROCEEDINGS
Jan 11	574	ORDER filed Jan. 6, 1983 that the deposition of Krystyna Janowski shall commence on 1-12-83. • • • •
Jan 12	583	ORDER filed Jan. 11, 1983, denying the motion of pltffs. to disqualify Carl J. Schuck, Esq. • • • •
Jan 14	588	ORDER filed Jan. 12, 1983, that Arthur N. Cohen or George Kokus appear before this Court on 1-17-83 and bring certain files; and that said documents be preserved for presentation at this hearing. • • • •
Jan 18	603	MEMORANDUM OPINION filed 1-17-83. • • • •
Jan 18	604	ORDER filed 1-17-83 granting motion of defts to exclude any evidence of the birth defects of Marco Cordova and Pauline Sand. • • • •
Jan 18		HEARING on motions. Deposition of Krystyna Janowski is to be resumed on 1-25-83. • • • • Discovery reopened for limited purpose of taking depositions of George Barnes, Nancy Barnes, Lawrence Larson, Mr. & Mrs. Koller, Pltfs. investigator Humphreys. Special Master is to conduct the additional depositions. Pretrial hearing continued until 1-31-83 at 10:30. • • • •
Jan 21	620	ORDER filed Jan. 19, 1983, affirming ruling of the Special Master [scope of waiver of attorney-client privilege]; and that this ruling shall apply to all other depositions and testimony taken to explore whether a fraud has been committed upon the Court. • • • •
Jan 26	634	ORDER filed Jan. 25, 1983, denying motion of deft. for summary judgment on the issue of causation. • • • •

DATE	NR	PROCEEDINGS
Jan 31		STATUS HEARING • • • • Deft. granted permission to depose two doctors and Mr. Mr. [sic] Clemente, but not Mr. Allis. • • • •
Feb 2	654	MEMORANDUM OPINION filed as of 1-31-83. • • • •
Feb 2	655	ORDER filed as of 1-31-83 denying motion of deft to exclude DERs setting limitations on use of DERs & that pltfs shall notify deft which five DERs they will use 5 days before trial. • • • •
Feb 3	657	STIPULATION filed 2-2-83 re: marking and use of trial exhibits. • • • •
Feb 7	665	MOTION by deft. to strike pltffs' exhibits which have not been served on or made available to deft. • • • •
Feb 7	669	MOTION by deft. for an order imposing sanctions on pltfs' counsel; Memo in support of motion for imposition of sanctions on pltffs' counsel, and to give notice of deft's. intention to move to strike jury demand and to dismiss complaint; Table of Authorities; Affidavit of Ogden N. Lewis w/Exhibit A (in clear binder containing 1 through 14 exhibits); Exhibit B.
Feb 9		• • • • Deft's. motion re Fraud on the Court argued and taken under advisement. • • • •
Feb 10		HEARING on contentions of both parties and pre-trial Matter continued to 2-11-83 at 10:00 A.M. • • • •
Feb 10	679	MOTION by Pltffs. to reconsider and modify th Court's Order of January 31, 1983, on the use of drug experience reports at trial and for leave of Court to supplement memoranda of points and

DATE	NR	PROCEEDINGS
		authorities previously filed with the Court on the issue of drug experience reports; Memo of P&A's; Exhibit 1.
Feb 14	680	RESPONSE of Pltffs. to deft's. Amended memorandum in support of motion for imposition of sanctions on pltffs' counsel and to give notice of deft's. intentions to move to strike jury demand and to dismiss complaint; P&A's; Exhibits A, B, C & D.
Feb 15		PRETRIAL resumed • • • • Respited until 2-16-83 at 10:15 A.M. • • • •
Feb 16		PRETRIAL Resumed and concluded; motions hearing set for 2-17-83 at 10:15 A.M. • • • •
Feb 17		PRETRIAL RESUMES; Motion of deft. to strike jury demand and to dismiss without prejudice heard, argued and taken under advisement; respited to 2-18-83 at 10:15 A.M. • • • •
Feb 18		PRETRIAL resumes • • • • Respited until 2-22-83 at 10:00 A.M. • • • •
Feb 18	705	ORDER granting deft's. motion for summary judgment on the issues of fraudulent misrepresentation and punitive damages. • • • •
Feb 22		PRETRIAL PROCEEDINGS. • • • •
Feb 23		PRETRIAL PROCEEDINGS. • • • •
Feb 25	713	ORDER filed 2-24-83 denying motion of pltffs. to reconsider the Court's order of 1-31-83 regarding Drug Experience Reports. • • • •
Feb 25		PRETRIAL PROCEEDINGS. • • • • Mr. Ryan's deposition is to be concluded and submitted with Mr. Allis' deposition by 2-28-83. • • • • Respited until 3-1-83 at 10:00 A.M. • • • •

DATE	NR	PROCEEDINGS
Mar 2		DEPOSITION of Nicholas R. Allis taken on Feb. 14, 1983 on behalf of deft. w/Exhibits; Errata.
Mar 2		DEPOSITION of Nicholas R. Allis taken on Feb. 24, 1983 on behalf of deft. (Vol. II); Errata; Exhibits.
Mar 2		PRETRIAL PROCEEDINGS. Motion of deft. for evidentiary hearing re: Fraud on the Court heard and taken under advisement. • • • • Respited until 3-7-83 at 10:00 A.M. • • • •
Mar 7		PRETRIAL PROCEEDINGS. • • • • Evidentiary hearing re: Fraud on the Court set for 3/10/83 @ 10:00 A.M. • • • •
Mar 8		DEPOSITION of Patrick M. Ryan taken on 2-26-83 on behalf of pltffs. Exhibits; Errata.
Mar 8	745	ORDER filed 3-8-83 setting an evidentiary hearing on 3-10-83 at 10:00 A.M. on the issue of Fraud on the Court; and that said hearing shall be held to determine whether any further action by this Court is necessary in the interest of the infant Pltf. or other parties to this action. • • • •
Mar 10		EVIDENTIARY HEARING begun and respited until 3-11-83 at 10:30 A.M. • • • •
Mar 11		EVIDENTIARY HEARING resumes; Respited until 3-14-83 at 10:00 A.M. • • • •
Mar 14		EVIDENTIARY HEARING resumes; Respited until 3-15-83 at 10:30 A.M. • • • •
Mar 15		EVIDENTIARY HEARING resumes; Respited until 3-16-83 at 10:00 A.M. • • • •

DATE	NR	PROCEEDINGS
Mar 15 [sic]		EVIDENTIARY HEARING resumes; taken under advisement; Proposed findings to be submitted by 3-22-83 at 12:00 Noon. • • • •
May 2	759	ORDER filed Apr. 29, 1983, to show cause why counsel for pltffs. (Butler, Jefferson, Dan and Allis) should not be disqualified from further representation of pltffs. in this case set for May 31, 1983 at 10:00 A.M. • • • •
May 27	764	MEMORANDUM by Pltffs. regarding Court's Order to show cause why James G. Butler should not be disqualified as counsel for releasing the drug experience reports to the Washington Post and the Food and Drug Admin.; Table of Authorities; Affidavit of James Butler; Exhibits 1, 1A and 2. • • • •
May 31		ORDER TO SHOW CAUSE continued to June 2, 1983 at 10:00 A.M. • • • •
Jun 8	768	SUPPLEMENTAL MEMORANDUM by deft. • • • • Supplemental Affidavit of Ogden Lewis w/Exhibits A through F.
Jun 21		STATUS CALL; order to show cause will resume on 6/30/83 at 10:30. • • • •
Jun 30		ORDER to show cause resumes; Respited until 7-1-83 at 10:00 A.M. • • • •
Jul 1		ORDER to show cause resumes, heard and taken under advisement. • • • •
Aug 24	778	SUPPLEMENT by Pltf. to testimony of Nicholas A. Allis and James G. Butler; Attachment.

DATE	NR	PROCEEDINGS
1984		
Jan 6		STATUS CALL: Further status call set for 1-12-84 at 3:00 P.M. Pltf to update response to defts' motion to dismiss by 1-10-84. • • • •
Jan 6	795	MEMORANDUM OPINION. • • • •
Jan 6	796	ORDER granting in part, deft's. motion to impose sanctions and revoking pro hac vice appearances of James G. Butler and Nicholas R. Allis as counsel for pltf. and revoking appearance of the firm of Butler, Jefferson, Dan and Allis. • • • •
Jan 19	805	NOTICE OF APPEAL by Pltf. from order entered Jan. 6, 1984. • • • •
Feb 1	818	COPY OF ORDER from USCA dated Jan. 27, 1984, granting appellants' motion, staying further proceedings in the District Court pending further order of USCA; granting appellants' request for expedited appeal.

Order of the District Court Excluding Testimony Regarding Thalidomide and MER/29 Filed October 19, 1982

FILED—Oct 19 1982—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 80-1258

(Judge Johnson)

ANNE ELISABETH KOLLER, et al.

Plaintiffs,

v.

RICHARDSON-MERRELL INC.,

Defendant.

ORDER

Upon the motion of defendant Richardson-Merrell Inc. and the affidavits, exhibits, and memorandum submitted therewith, it is hereby

ORDERED that defendant's motion pursuant to Rules 402, 403 and 404 of the Federal Rules of Evidence to exclude testimony and evidence relating to the drugs Thalidomide and MER/29, and any connection of defendant therewith, is GRANTED.

/s/ NORMA HOLLOWAY JOHNSON
United States District Judge

October 19, 1982

Clerk's Office Notification of Trial Date
Dated December 7, 1982

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
WASHINGTON, D.C. 20001

December 7, 1982

Mr. George A. Kokus
Mr. Allen T. Eaton
Mr. Richard L. Swick
Mr. W. David Allen
#503;
1025 Vermont Avenue, N.W.,
Washington, D.C. 20005

ANNE ELISABETH KOLLER, et al.

vs.

RICHARDSON-MERRELL, INC.

Civil No. 80-1258

Please be advised that the above entitled case is set for Trial (Continued from 1-10-83) on January 17, 1983, at 10:00 before Judge Norma Holloway Johnson in Courtroom No. 4.

JAMES F. DAVEY, Clerk

By: L.B. Angel
Courtroom Clerk, (535-3547)

cc: Mr. James G. Butler
Miss Anne L. Karppinen
Mr. Michael A. K. Dan
Mr. Donald W. Madole
Mr. Thomas H. Tate
Mr. Mark L. Austrian
Mr. Ogden N. Lewis
Mr. Arthur F. Golden
Mr. Lawrence E. Walsh
Mr. Alfred E. Schretter
File
Chambers
lba

CO 301
Rev. 11/75

Excerpts from Defendant's Proposed Questions for Voir Dire Examination Filed December 15, 1982

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

• • • •

16. Has he read any article with respect to the following:

Birth defects
Drug injuries
Drugs
Drug Companies
Physicians

(a) If so, try to list or describe such articles.

• • • •

35. Has he studied or read as to the causes of birth defects?

• • • •

41. Has he read on this subject?

• • • •

63. It is possible that there will be newspaper stories and TV or radio coverage of this trial. Can the prospective juror disregard these stories and render his verdict solely on the evidence produced in court at this trial?

64. Would he be willing to follow the instructions of this court as to disregarding the newspaper stories and TV coverage?

• • • •

66. Has the prospective juror read any newspaper, magazine or other published story regarding this case, Mrs. Cynthia Koller, Mr. John Koller, Anne Koller, Richardson-Merrell Inc., or the drug Bendectin, including any article published in the Washington Post, Washington Times, U.S.A. Today, the National Enquirer, Mother Jones Magazine or any other publication?

66A. Has the prospective juror read any newspaper, magazine or other published story about Bendectin including any article published in the Washington Post, Washington Times, U.S.A. Today, the National Enquirer or Mother Jones Magazine or any other publication?

66B. Does he recall receiving information from any source regarding Bendectin?

(a) Does any prospective juror read the National Enquirer or Mother Jones Magazine?

67. Has he heard any television broadcast or radio broadcast with respect to Mrs. Cynthia Koller, Mr. John Koller, Anne Koller, Richardson-Merrell Inc. or the drug Bendectin?

• • • •

75. Has the prospective juror read or heard anything about this case prior to today? If so, can the prospective juror disregard what he has heard and be guided in reaching a verdict only by what is presented in court?

• • • •

Affidavit of Ogden N. Lewis in Support of Defendant's Motion for Permission to Take Additional Expedited Discovery Filed December 29, 1982

United States District Court for the District of Columbia

(Caption Omitted in Printing)

AFFIDAVIT OF OGDEN N. LEWIS IN SUPPORT OF DEFENDANT'S MOTION FOR PERMISSION TO TAKE ADDITIONAL EXPEDITED DISCOVERY

• • • •

Ogden N. Lewis, being duly sworn, deposes and says:

1.

• • • • I make this affidavit in support of defendant's motion for permission to take additional expedited discovery in this case on the ground that fraud may have been committed upon the Court and defendant in the maintenance and prosecution of this action.

2. Annexed hereto as Exhibit A is a copy of a telephone message received at the offices of Davis Polk & Wardwell in New York City on December 22, 1982. The message was transcribed at the time it was received by Loretta Hutchinson, a Davis Polk receptionist.

3. Annexed hereto as Exhibit B is a copy of a second telephone message received at the offices of Davis Polk & Wardwell in New York City on December 22, 1982. The message was transcribed at the time it was received by Annette Barth, a Davis Polk secretary. • • • •

12. My letter to the Court and plaintiffs' counsel of December 27, 1982 is annexed as Exhibit G. * * * *

/s/ OGDEN N. LEWIS
Ogden N. Lewis

Sworn to before me this
29th day of December, 1982.

/s/ LINDA D. HURLEY
Notary Public
My commission expires Aug. 14, 1984

(Certificate of Service Omitted in Printing)

Exhibit A to Affidavit of Ogden N. Lewis
Filed December 29, 1982

JUDGE WALSH

FOR: MIRIAM CEDARBAUM

KRYSTYNA JANOWSKY (NICK ALLIS' SECRETARY)

* MRS. KOLLER IS LYING WHEN SHE SAYS SHE TOOK BENDECTIN FROM BULK ORDER AT WALTER REED ARMY HOSPITAL. SHE DID NOT TAKE BENDECTIN TILL MUCH LATER. THE CONTAMINATED SHAK - LEE PRODUCT IS WHAT I (~~BELIE~~) BELIEVE DAMAGED HER UNBORN BABY.

- SHE REFUSES TO WORK ON CASE BECAUSE IT IS FRAUDULENT.

K. JANOWSKY'S #: (312) 384 - 0520

RITA

Exhibit B to Affidavit of Ogden N. Lewis
Filed December 29, 1982

For Mrs. Cedarbaum

Krystyna
Jankowski

Secy to
Nicholas C.
Allis -

afraid she will
lose her job
for calling you
& wants it
kept extremely
confidential.

She has refused
to work on the
Koller case be-
cause Cynthia
Koller was a
health food
fanatic who
"gobbled up"
all kinds of
health food

12/22 during the
first trimester
of her pregnancy.
She particularly
~~ate~~ ingested
Stak-Lee
~~products~~ -
wheat germ
which was
found to be
Contaminated.
Everyone in
her firm is
sworn to
secrecy - not
to mention
Stak-Lee

her # in Chi
is
312-384-0520

Exhibit G to Affidavit of Ogden N. Lewis
Filed December 29, 1982

DAVIS POLK & WARDWELL
1575 I Street, N.W.
Washington, D.C. 20005

(Letterhead Abbreviated in Printing)

December 27, 1982

Re: Koller v. Richardson-Merrell, Inc.
Civil Action No. 80-1258

Honorable Norma Holloway Johnson
United States District Judge
United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20003

Dear Judge Johnson:

On Wednesday, December 22, 1982 our office received two unsolicited telephone calls from a woman who identified herself as secretary to Mr. Nicholas Allis, one of plaintiffs' counsel. These two telephone communications were taken by receptionists at our office in New York City. The message as relayed was that she refused to work on the case because it is "fraudulent".

We inquired of your law clerk whether it would be possible to arrange a conference before the Court closed for Christmas or whether we might have time to at least verify the identity of the caller. As I had indicated to your law clerk we did not then have any information as to her identity or the bona fides of the messages. Since then we have identified the caller as Mr. Allis' secretary.

Having confirmed this, we arranged independent counsel for the person who communicated with us so that he might advise

her with respect to the law of attorney-client communications and any possible duty to the Court.

It is our understanding that this morning, the person who had communicated with us was told by one of plaintiffs' counsel that she was confronted with possible imprisonment if she persisted with a course of disclosure. We have referred this information to her counsel.

We are sending copies of this letter to counsel for plaintiffs and to counsel for the witness as well as to your Honor so that all may be advised as to the course of these activities.

We respectfully request a conference with the Court so that it may, if it sees fit, prevent intrusion by any party or its counsel until the informant and her counsel have had an opportunity to evaluate the substance of her information and, if appropriate, inform the Court.

Respectfully,

/s/ OGDEN N. LEWIS
O. N. Lewis

Enclosures

cc: James G. Butler, Esq.
Allen T. Eaton, Esq.
Cohen & Kokus
Branton & Branton

Exhibit 21 to Defendant's Memorandum of Law With Respect to Issues of Attorney-Client Privilege—Letter of James G. Butler to the District Court

BUTLER, JEFFERSON, DAN & ALLIS
Attorneys and Counselors at Law
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017

(Letterhead Abbreviated in Printing)

December 28, 1982

Honorable Norma Holloway Johnson
United States District Judge
United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20003

Re: Koller v. Richardson-Merrell

Dear Judge Johnson:

On December 28, 1982, we received the letter dated December 27, 1982, directed to yourself from Odgen Lewis with respect to our secretary, Krystyna Janowski.

I was first informed of the nature of the problem on Sunday night, December 26, 1982, when Mr. Richard Daum, a paralegal in our office, called me at home and stated that he had received a call from Ms. Janowski regarding the Koller case. According to Mr. Daum, Ms. Janowski wanted to alert us that she had been approached by a representative of the defendants, namely Barnes and Associates, to sign a statement which in effect stated that she had a conversation with Mrs. Koller in which Mrs. Koller denied ever having taken Bendectin during the first trimester. My first reaction was one of disbelief and I did nothing that evening feeling that perhaps Ms. Janowski was under great emotional stress because of her child. However, after arriving in the office on Monday morn-

ing, I was shown a card bearing the name of George Barnes of Barnes and Associates and a card with the name of Carl Schuck, a local attorney from Los Angeles.

Desiring to obtain the truth of the matter and since Ms. Janowski has recently given birth to a premature child several weeks ago who is still hospitalized, we reached her at California Hospital that morning after several attempts. At that time she made an appointment with Mr. Allis, her superior, who talked to her at the hospital regarding the entire matter. Urged by Mr. Allis to tell only the truth and all of the truth, she stated that she never did have any conversation with Mrs. Koller in which Mrs. Koller expressed any statement other than what she has sworn to under oath in depositions and affidavits in connection with the case. Ms. Janowski, however, did say that she had been offered an apartment and relocation expenses if she would sign such a statement. We also have learned that she stated that she has been offered $15,000 to sign such a statement. Ms. Janowski states that when she was approached by the representatives of the defendant, they had copies of her alleged criminal record (of which we had no knowledge), copies of four bank statements, a plan of our office, the birth certificate of her child, made numerous inquiries of our storage facilities and whether they were fire resistant, and whether we kept duplicates.

Based on the conversation of Mr. Allis with Ms. Janowski on Monday morning, a simple statement of what she had told Mr. Allis was prepared and given to her and signed by her, a copy of which is attached. Also attached is a statement given to Mr. Allis at that time which purports to be the content of the statement (as recalled by her) which she had been urged to sign by the defendant's representatives.

Obviously this is a serious matter and it is my desire that the court have a hearing at the earliest possible date convenient to the court to decide what would be the proper course to follow. It is also requested that defendants be ordered to cease and desist their attempts to contact this secretary.

I must state categorically that at no time has anyone in this office ever threatened Ms. Janowski with possible imprison-

ment if she persisted with the course of disclosure or any other form of intimidation. With respect to the conversations alleged to have taken place with respect to Mrs. Koller, I have consulted with Mrs. Koller and to the extent of any purported conversation of Ms. Janowski with Mrs. Koller, we are willing to waive the attorney-client privilege as to any inquiry by the court or any independent counsel appointed by the court. Parenthetically, Mrs. Koller has again stated categorically that she took Bendectin during the sensitive period.

We view with extreme seriousness the manner in which defendant has sought to handle this matter by sending representatives repeatedly attempting to have our secretary sign a statement. It also concerns me that a call was made to the court without any notification to our firm regarding the nature of the call. We also spoke to Jeff Leon at 3:00 p.m. Washington, D.C. time today in an attempt to immediately set a hearing to advise your honor of the complete circumstances as to what has occurred and the facts as we understand them.

We are very anxious to have this matter resolved quickly and we of course only wish the disclosure of the full truth. I earnestly request that this matter does not delay the trial in any way.

Very truly yours,

BUTLER, JEFFERSON, DAN & ALLIS

/s/ JAMES G. BUTLER
James G. Butler

JGB:fl
cc: Ogden Lewis
Allen T. Eaton
George Kokus
Wiley Branton

Attachment to Mr. Butler's December 28, 1982 Letter to the District Court

27 December 1982

Last week I was in the state of severe agitation and depression and felt a lot of hostility towards the law firm of Butler, Jefferson Dan & Allis. Today I feel calm and my mind is free and clear. At no time did I ever hear Cynthia Koller or anyone else say that Cynthia Koller did not take Bendectin. George L. Barnes & Associates, Inc. had been trying to get me to sign a statment saying that I heard Cynthia Koller say that she did not take Bendectin. Such a statement would be false and I would not sign such a statement for that reason. Mr. Barnes and others have promised that if I signed such a statement they would be able to relocate me and would take care of all of my wants and needs including renting a comfortable apartment for me and by baby. Any conversation I had with George

26

Barnes, Patrick Ryan or any other person from Davis, Polk & Wardwell or George Barnes & Associates was at a time when I was ~~feeling~~ extremely upset and under great emotional stress. At the present time my mind is free and clear and everything in this statement is true and correct. I have been promised no remuneration of any kind by any representative of Butler, Jefferson, Dan & Allis for stating these true statements or for anything else.

KRYSTYNA JASIOWSKI

27

Under penalty of perjury, I swear that the above-typed statement is true and correct.

(KJ)

Second Attachment to Mr. Butler's December 28, 1982 Letter to the District Court

ARE YOU OK?

...I'M JUST WORRIED —

YOU'RE WORRIED ABOUT ALL THESE TREES?

NO. I'M WORRIED ABOUT THE TRIAL.

ARE YOU AFRAID IT'LL BE CALLED OFF AGAIN?

NO. I'M WORRIED ABOUT THE EXPERTS. MAYBE THEY WON'T BE ABLE TO CONVINCE THE JURY THAT BENDECTIN IS A TERATOGEN.

I DON'T THINK THAT THAT'S THE PROBLEM, OUR PROBLEM IS GOING TO BE CONVINCING THE JURY THAT YOU TOOK BENDECTIN DURING THE FIRST TRIMESTER WHEN WE KNOW — AND YOU KNOW — THAT YOU DIDN'T.

JIM BUTLER SAYS HE CAN CONVINCE THE JURY ITS MIDNIGHT, EVEN IF THEY CAN SEE THE SUN SHINING THROUGH THE COURTROOM WINDOWS.

THE ABOVE "CONVERSATION" IS THE ONE THEY WANT ME TO "RECALL" HAVING.

KRYSTYNA JANOWSKI

Exhibit 22 to Defendant's Memorandum of Law With Respect to Issues of Attorney-Client Privilege—Letter of Carl J. Schuck to the District Court

OVERTON, LYMAN & PRINCE
550 South Flower Street, Fifth Floor
Los Angeles, California 90071

(Letterhead Abbreviated in Printing)

January 3, 1983

Honorable Norma Holloway Johnson
United States District Judge
United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20003

Re: Koller v. Richardson-Merrell

Dear Judge Johnson:

I write on behalf of Krystyna Janowski whom I represent independently of the parties. Ms. Janowski knows my fees and expenses will be paid by the defendants. I have reviewed the facts and circumstances in depth with Ms. Janowski in the course of extensive interviews, and she wishes me to be her lawyer.

Ms. Janowski has reviewed the letter directed to you dated December 27, 1982 from O. N. Lewis of Davis Polk & Wardwell; the letter to you dated December 28, 1982 by James G. Butler of Butler, Jefferson, Dan & Allis; and the discovery motion papers, dated December 29, 1982, signed by defense counsel and presumably filed with this Court. Ms. Janowski and I have also read the exhibits attached to all the foregoing materials.

Ms. Janowski, by this communication, disavows the one-page typewritten statement signed by her and dated in writing at the right upper corner "27 December 1982." That statement was obtained from her under duress and on an offer to

continue payment by the Butler firm of her full salary and fringe benefits, including hospitalization expense coverage, for her hospitalized premature baby. Ms. Janowski has repeatedly told partners and representatives of the Butler firm that she was no longer working for them, and all she wanted was the pay due her, including accumulated vacation pay, and the right to maintain her medical insurance. She reaffirms that position and specifically does not want that firm to send her any checks or money for anything other than what she is entitled to.

I have advised Ms. Janowski to submit to testifying fully and truthfully to the facts and circumstances surrounding the signing of the typewritten statement just referred to, and the other matters subject to privilege constraints. I have also advised her I would request the deposition take place in Los Angeles because she has a premature baby born November 27, who now weighs less than 4 1/2 lbs. Also, I have advised that because of the sensitivities involving privilege and otherwise and to protect her against potential harassment at deposition, I would as her counsel take the position that the deposition only be taken before a special master appointed pursuant to Rule 53 F.R.Civ.P. and that, among other things, there be an appropriate order that the master conduct the proceedings and make rulings on objections, including any relating to privilege.

Your clerk can reach me at (213) 683-5333. My residence number is (213) 617-7117.

Very truly yours,

/s/ CARL J. SCHUCK
Carl J. Schuck

CJS/pl

cc: All Counsel

I have spent many hours with Mr. Schuck reviewing the matters above referenced. He has given me the advice above described and, after consideration, I accept it. I disavow the statement referred to and am willing to submit to deposition in the manner he has described above.

/s/ KRYSTYNA JANOWSKI
Krystyna Janowski

Excerpt from United States District Court for the District of Columbia Hearing Transcript of January 4, 1983

[12] * * * * MR. WALSH: He again reiterated his feeling for a need of a special master because of the privilege questions, and he asked that the deposition be taken either in federal court or his office and that papers hereafter be served on [13] him rather than Ms. Janowski.

May I interrupt all of this to tell you how he came into the case and his relationship with us?

When we finally located Ms. Janowski, it occurred to us that the attorney/client privilege could be a potential embarrassment and that we might blunder into it in trying to find out what she had to say. I called Leonard Jenofsky, who is a former president of the American Bar Association in Los Angeles, and asked him whether he would act for Ms. Janowski completely independent of us. He considered it with his firm and decided they should not because of Mr. Jenofsky's acquaintance with me. They recommended Mr. Schuck, whom I don't know. As far as I know, I have never met him. They made the arrangement with Mr. Schuck. All I did was ratify it and commit the defendant to pay whatever there is to pay as far as his fees are concerned. But he has made perfectly clear to me that he is not concerned with this lawsuit; he's concerned with his client, who is the witness, and his independence is paramount in his mind. He is as opposed to our intruding on her privacy as he is Mr. Butler, and one of his requests is that no party deal with her until she is deposed at a time to be set by Your Honor. * * * *

Plaintiffs' Motion to Disqualify Counsel for Witness Because of Conflict of Interest Filed January 7, 1983

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

MOTION TO DISQUALIFY COUNSEL FOR WITNESS BECAUSE OF CONFLICT OF INTEREST (DECLARATIONS OF NICHOLAS ALLIS, J. BUTLER, WILLIAM CANALEZ, RICHARD M. COLEMAN, RICHARD DAUM, AND FLOYD HUMPHRIES ATTACHED HERETO)

Based upon the aforesaid Declarations, this Motion and the memorandum of law submitted herewith, plaintiff ANNE ELISABETH KOLLER, hereby moves this Court for an Order disqualifying Carl Schuck from acting as attorney for the witness Krystyna Janowsky and for an Order by this Court appointing independent counsel for Ms. Janowsky—the fees and expenses for said counsel to be shared equally by the plaintiff and defendant in the instant action and said independent counsel to be someone not connected with a firm heavily engaged in either insurance defense or plaintiff personal injury practice. The facts contained in the attached Declarations reveal that Mr. Schuck has been hired and paid for by the defense firm, is with a firm that does extensive representation of insurance defendants, owes "favors" to the defense firm and has made certain statements, all of which indicate that he has interests which may be in conflict with the interests of Ms. Janowsky, who was formerly employed by the law firm representing the plaintiff in her suit against the defendants. The Declarations also reveal that Ms. Janowsky stated that her initial contact with the defense firm was solicited by an unidentified man who said the firm had a remunerative offer to make to her.

DATED: January 4, 1983.

BUTLER, JEFFERSON, DAN & ALLIS

By /s/ JAMES BUTLER

Excerpts from Plaintiffs' Memorandum of Law in Support of Motion to Disqualify Counsel for Witness Filed January 7, 1983

(Caption Omitted in Printing)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR AN ORDER DISQUALIFYING COUNSEL FOR THE WITNESS JANOWSKY AND FOR AN ORDER THAT INDEPENDENT COUNSEL BE APPOINTED

* * * *

III. *Requested Relief.*

Plaintiff respectfully requests that the Court, after consultation with the State Bar of California, select counsel for Ms. Janowsky who is not associated with a firm that is heavily engaged in either insurance defense or plaintiff personal injury practice. The fees and expenses of the attorney so selected will be shared equally by plaintiff and defense. * * * *

Excerpts from Declaration of Richard M. Coleman Dated January 3, 1983 Annexed to Plaintiffs' Motion to Disqualify Counsel for Witness

I, RICHARD M. COLEMAN, declare:

1. I am an attorney, a member of the State Bar of California and counsel for the firm of Butler, Jefferson, Dan & Allis (hereinafter "The Butler Firm") in regard to charges raised against the firm by the defense in the case of KOLLER vs. RICHARDSON-MERRELL, INC., Civil Action No. 80-1258 pending in the United States District Court for the District of Columbia.

2. On Friday, December 31, 1982, I received a telephone call from Nicholas Allis of The Butler Firm. He said someone was getting on the other line whom he introduced as William

Canalez, a private investigator. Mr. Canalez stated that he and Mr. Allis had talked with Krystyna Janowsky in the lobby of the law firm's building.

3. Ms. Janowsky stated to them that she was unhappy with the great amount of pressure that was being put on her by the other side to sign a statement. She said they must be spending a fortune because cars were following her all the time.

At this point, Mr. Canalez heard Mr. Allis say to Ms. Janowsky that she had an attorney and he (Mr. Allis) could not talk to her about it.

Ms. Janowsky replied that she did not have an attorney, that Carl Schuck was not her attorney and as far as she was concerned, Mr. Schuck was the attorney for the Davis firm. She said that if she signed a statement, then he would become her attorney but he was not her attorney now.

4. Messrs. Canalez and Allis both stated that Allis at this point told Ms. Janowsky to call Mr. Schuck and have Mr. Schuck get in touch with Mr. Coleman and with the Davis office so that she could get truly independent counsel. At this point, Mr. Canalez said that Ms. Janowsky replied that she did not want a lawyer and that she did not need a lawyer. She said that she spent nine hours in an attorney's office with them trying to get her to sign a statement. Mr. Canalez and Mr. Allis both stated that Mr. Allis asked Ms. Janowsky words to the effect "Is everything you said in the statement you gave to me true?" Mr. Canalez and Mr. Allis heard Ms. Janowsky respond that that statement was all true.

5. On Monday, January 3, 1983 at approximately 7:30 a.m., I received a telephone call from a woman who identified herself as Krystyna Janowsky.

6. She said that she was under terrible pressure by the other side and that she had gone to the hospital to get away from them; that they wanted her to give them a statement and she did not want to give them a statement. She said she had been trying to give a statement that the original charge was dishonest but they said that she could not go back, she had to go

forward. She said they had people following her around the clock. She asked me if I had a copy of the statement she had given to Nick Allis. I said I did. She said she had a husband in Mexico and that is where she wanted to go but then she got worried that perhaps if she did that, the statement she gave to Mr. Allis would not be sufficient to clear things up and she wanted to give a complete statement to that effect.

7. She said that she did not know what to do because she had a lawyer, Carl Schuck, who she thought was a good person but owed favors to the other side and did not want her going back on anything. All he wanted was to have her go forward and give a statement. She said Mr. Schuck wanted her to give a statement even though she told him she did not want to do so. He had told her that a deposition had already been set up. She said that on another occasion, they had tried to make her give a deposition without any notice to her. She had walked into a room and found a court reporter there and she just ran.

8. I said that if she is represented by counsel, I could not speak with her. She said she did not know what to do, how to extricate herself from the position.

9. I said that no one can force a lawyer on anyone and that she could discharge a lawyer anytime she wanted. She said they told her that if she did that she would be without a lawyer and she would be like a sheep among wolves. I told her that she could get a lawyer that was not indebted to either side to protect her interests but I said that I could not speak with her as long as she was represented by counsel and that she as an experienced legal secretary would understand that.

10. She said that she did not know what to do and that she had a nine o'clock appointment that morning with Mr. Schuck. I suggested that she call Mr. Schuck and discuss the representation with him and that, if she liked, she should ask him to call me and, if she wanted me to do so, I would go down to his office and meet with him. She said alright and we terminated the call.

11. When I did not hear from Mr. Schuck by 9:15 a.m., I called him and related the above. I told him I intended to recommend to the Butler Firm that a Motion be made to disqualify him from representation of Ms. Janowsky. He said Ms. Janowsky was in his office and he would call me in a bit. He telephoned at approximately 2:45 p.m. to say Ms. Janowsky was willing to give a deposition and he would arrange a conference call with all interested parties.

* * * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California this 3rd day of January, 1983.

/s/ RICHARD M. COLEMAN
Richard M. Coleman

Affidavit of James G. Butler Dated January 5, 1983 Annexed to Plaintiffs' Motion to Disqualify Counsel for Witness

(Caption Omitted in Printing)

AFFIDAVIT OF JAMES G. BUTLER

* * * *

JAMES G. BUTLER, being duly sworn, deposes and says:

1. I am a member of the law firm of Butler, Jefferson, Dan & Allis, attorneys for Plaintiffs. I am a member of the Bar of the State of California and of various federal courts.

2. I make this affidavit in support of the plaintiffs' motion to remove Carl Schuck as independent counsel for Krystyna Janowski.

3. On December 27, 1982, I was informed that Carl Schuck had come to her house and left his card attempting to act as

attorney for Krystyna Janowski. I was informed that Ms. Janowski did not consider him as her attorney and that she felt that he was acting on behalf of the defendant Richardson-Merrell.

4. On December 28, 1982, I received a copy of the Ogden Lewis letter to the court in which Mr. Lewis stated "we arranged independent counsel for the person who communicated with us so that he might advise her with respect to the law of attorney-client communications." Upon receipt of that letter on December 28, 1982, noticing that the copy of the letter we received indicated no copies other than to James Butler, Allen T. Eaton, Cohen & Kokus, and Branton & Branton, I wondered why a copy had not been sent to the alleged "independent attorney." I then called Schuck, whose card had been left with Krystyna Janowski and had been provided to us by her, and had a conversation with him. I first asked him if he had received a copy of the Ogden Lewis letter of December 27 even though it had not been indicated on my copy of that letter and he acknowledged he had received a copy of Mr. Lewis' letter to the court.

5. I next asked him "Are you being paid by Davis, Polk?" and he replied "Can't answer." I asked him if he had a copy of Ms. Janowski's statement. He stated he didn't see Ms. Janowski today, December 28, and he didn't know if he expected to see her, that everything was set for him to see her but Ms. Janowski didn't keep her appointment. I asked him who called him into this and he answered "I was asked to act independently for her by Ed Walsh and that I [Schuck] told him [Walsh] that I [Schuck] would do it only on the explicit understanding that I [Schuck] was being totally independent." Schuck further stated that he didn't find out about the communication to the court until after it had happened. I then advised him that I would send him a copy of Ms. Janowski's statement which I did that same day.

6. The firm of which Mr. Schuck is a member has represented defendants in cases in which our firm represents plaintiffs including the current case of *John Leon Seevers v. Syntex Laboratories, Inc.*, Case No. C231575 presently pending in the Superior Court of the State of California for the County of Los Angeles. In this case, Mr. Schuck's firm has represented a large pharmaceutical company. His firm also has opposed our firm in other cases including the Estate of J. Paul Getty and has also represented American Airlines in the DC-10 crash in Chicago at O'Hare in which we represented plaintiff cases.

7. It is my belief that he cannot act as "independent counsel" not only because he is being paid by the defendant in this case but also because his firm has represented at least one pharmaceutical company in a similar case involving birth defects caused by a drug, e.g., birth control pill. It is my belief that the case presently pending before the court has far reaching effect to the entire pharmaceutical industry and in which I believe there is a basic conflict of interest in representing this woman under these circumstances. It is not my intention to impugn the integrity of Mr. Schuck but I believe under the circumstances, he cannot "act as independent counsel."

/s/ JAMES G. BUTLER
James G. Butler

Sworn to before me this
5th of January 1983.

/s/ CAROL M. ASAKURA
Notary Public

[SEAL]

Affidavit of Richard Daum Dated January 5, 1983 Annexed to Plaintiffs' Motion to Disqualify Counsel for Witness

(Caption Omitted in Printing)

AFFIDAVIT OF RICHARD DAUM

• • • •

I, RICHARD DAUM, being duly sworn, deposes and says:

1. I am a legal assistant in the law firm of Butler, Jefferson, Dan & Allis. On Sunday, December 26, 1982 I received a call from Krystyna Janowski asking to speak with Mr. Nicholas Allis. Mr. Allis was not in and she spoke to me at length.

2. Essentially, she stated that she had been contacted by investigators for Davis, Polk & Wardwell and an attorney associated with Davis, Polk & Wardwell. She said these people were trying to pressure her to sign a statement that was untrue concerning ingestion of Bendectin by Mrs. Koller. She said that investigator George Barnes approached her and had a copy of her criminal record, her bank account, her child's birth certificate and a floor plan of our office. Neither I nor any one that I am aware of knew that she had a criminal record. He offered to pay for a top "defense" attorney for her. It was unclear whether the attorney was going to be for her criminal problems or possible problems associated with these events. In any event, she feared arrest if she did not cooperate and was told an attorney would visit her the next day.

3. On Friday at 8 or 9 o'clock in the morning, a man with grey hair, over 6 ft. tall, 60 to 65 years old and wearing a grey suit arrived at her apartment. He was uncomfortable that Luis Castillo was there and did not want to talk. He identified himself as Carl Schuck of Overton, Lyman & Prince. He stated that he did not want to do what he was doing. He felt that it was unethical but he had a favor to repay. He wanted to just give her some counseling, but wished to do it when she was alone. He read something to Krystyna which she believed to be from some evidence code. They agreed to meet in his office at

10:30 a.m. Tuesday, December 28, 1982. He wrote his name and address and an appointment time on a card. She did not state that this man was her attorney. On the contrary she acted as if he was associated with Mr. Barnes and Mr. Ryan and that Mr. Schuck's role was part of their efforts to have her sign a statement which she believed to be false.

/s/ RICHARD DAUM
Richard Daum

Sworn to Before Me This
5th Day of January, 1983.

/s/ CAROL M. ASAKURA
Notary Public

[SEAL]

Affidavit of William Joseph Canalez Dated January 5, 1983 Annexed to Plaintiffs' Motion to Disqualify Counsel for Witness

(Caption Omitted in Printing)

AFFIDAVIT OF WILLIAM JOSEPH CANALEZ

I, WILLIAM JOSEPH CANALEZ, being duly sworn depose and say:

1. I am a Private Investigator licensed in the State of California and the owner of Cambridge Investigations, 15760 Ventura Boulevard, Suite 900, Encino, California 91436.

2. I have been in the field of investigations for 18 years including 12 years as a Special Agent for the Federal Bureau of Investigations. I am fluent in Spanish and English.

3. On December 31, 1982, I went to the office of Mr. Nicholas Allis at 626 Wilshire Boulevard, Los Angeles, at his request, to discuss the matter concerning his former secretary

in a law suit which his firm is handling. Shortly before 11:00 a.m. Mr. Allis and I began discussing this matter in his office. About thirty to fourty minutes into the conversation, there was a knock on his door. The door was opened and a young man in his twenties of Mexican extraction, walked in with a very young baby in his arm. This person was identified as Luis. For approximately five to ten minutes we talked about the baby, its health etc. and the mother and her health etc. Subsequently, we talked to him regarding his knowledge of the Bendectin lawsuit and the events of the past week. Luis mentioned several occasions on which investigators for Defendants had spoken to Krystyna Janowski. The latest occurred the day before, December 30, 1982, at the hospital. When Krystyna went to pick up her baby, there were about nine persons who, according to Luis, had rented a room in the hospital. They wanted a private place where they could speak to Krystyna alone. Krystyna spoke to them for fifteen to twenty minutes. Luis was not present during any of these conversations. He knows Krystyna was asked to sign a paper on previous occasions or occasion by Defendants but refused.

4. I translated into Spanish what the statement signed by Ms. Janowski stated and Luis said he understood. He advised to the best of his knowledge that the information in this paper was correct. He said he knew that she had signed that statement for Mr. Allis. He stated that he knew Krystyna was unhappy about pay, long hours, and losing her parking space.

5. Subsequently, I went to the lobby of the office building, helping Luis carry items belonging to Krystyna Janowski. We found her in the Savings and Loan on a public telephone. When she saw us she said to Luis "did you sign a statement?", Luis said "no." She asked Luis, "Did you give them a statement?" Luis said "no." She asked Luis why did they have you and my baby locked up? Luis shook his head from side to side and said "Krystyna No . . . " while shrugging his shoulders. I left without saying anything since she appeared very upset and concerned about whether Luis had given a statement. I went

back to the office of Butler, Jefferson, Dan & Allis and Mr. Allis subsequently accompanied me to the lobby. She stated that she had called the police. She claimed that two secretaries in the office had lied to her about Luis' whereabouts when she had called the office. She stated she was going to charge the office with kidnapping. Ms. Janowski demanded her vacation pay. Mr. Allis asked her how much was due her. She advised two weeks. Mr. Allis advised he would go upstairs to check on this matter. He did go upstairs and returned several times, first to secure the amount from the pay check which had already been given Ms. Janowski and the second time to return with the check for the vacation pay. She continued to be upset about Luis. She was advised by me that Luis had been free to go whenever he wanted and that there were persons who had come into the office to see the baby while Luis was there.

6. Initially, Mr. Allis advised Ms. Janowski that he was uncomfortable in talking to her. He asked if she was represented by an attorney. She said that she was not represented by an attorney. She denied that she was represented by Mr. Schuck and said he was not her attorney. Instead, the New York law firm representing Defendants had hired Mr. Schuck and he was their attorney. She stated that she did not need an attorney. Only if she signed a statement for them would Mr. Schuck be her attorney and she had not signed any statement and was not planning to sign any such statement because the statement they wanted her to sign was false.

7. Towards the beginning of the encounter with Ms. Janowski, Mr. Allis told her that he would like to talk to her but it would be more comfortable in the presence of attorneys. Since she said that Mr. Schuck was not her attorney, Mr. Allis advised her to go to Mr. Schuck and demand that he immediately call Mr. Coleman and an attorney for Davis, Polk and Wardwell and arrange for independent counsel to be appointed for her. She stated that she did not need or want an attorney.

8. During this entire period when I was with Krystyna Janowski in the lobby, she was at times speaking very loudly

and was upset. At other times, she was quiet and pleasant. When she was upset, she advised she was going to the police station and file a report that her baby had been kidnapped; she also advised that her memory had just crystallized and that she was just going to see Davis, Polk and Wardwell and give them a statement; she further advised that Davidia Vega and Faye Lum-Lee had lied to her about the whereabouts of Luis and her baby. She said Mr. Allis knew that they had lied and that Mr. Allis was responsible for them lying.

9. When Ms. Janowski was calm, she advised that the statement she had signed for Mr. Allis was true. She said the other side had to be spending lots of money because they had so many different people working on the case and were spending so much time on this case. They were pressuring her to make a statement which she did not want to make because it would be false. She said they had been to see her many times at her residence and they even had someone watching her residence from a car parked on the street. Additionally, on one occasion Luis went to the bathroom to urinate and he saw a white male with a beard who was looking inside through the window. She advised this person had come to her house with the private investigator George Barnes. When she was at the hospital there were about nine persons there. They had obtained a room in the hospital and were there trying to take a statement from her. She talked to this group, some of whom were from New York City, but did not sign any statement. She advised she did not want to talk to them and did not want to be bothered by them. She advised she knew it was a powerful New York law firm and possibly it would be wise to cooperate with them. She also advised she had seen attorney Schuck for many hours. He had shown her documents, papers which had been filed in this case. She said she was familiar with everything they were filing with the Court. She further advised that Schuck was from an influential law firm in Los Angeles. She pondered the possibility that if she signed a statement for him, his firm might be able to find her a good job.

10. Mr. Allis asked her not to leave the area but to stay and tell the truth. Then, she turned to Mr. Allis and said my memory has just "crystallized" and I'm going over to sign a statement at Davis, Polk and Wardwell and then I am going to Mexico with my baby to visit my husband and I have a perfect right to do [illegible].

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of January, 1983, at Los Angeles, California 90017.

/s/ WILLIAM J. CANALEZ
William Joseph Canalez

Subscribed and sworn to before
me on this 5th Day of January,
1983, at Los Angeles, CA.

/s/ DONNA K. RANTA
Notary Public

[SEAL]

Excerpt from Exhibits Annexed to Plaintiffs' Opposition to Defendant's Motion to Take Depositions of Plaintiffs' Representatives Filed January 10, 1983

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

DECLARATION OF REAR ADMIRAL
G. J. B. CRABB, RET.

I, G. J. B. Crabb, being duly sworn, testify and declare:

1. I am retired from the Australian Navy where I held the rank of Rear Admiral. On August 25, 1980, I wrote a letter to Dr. William McBride concerning what I believe to be an investigation of Dr. McBride in order to discredit him as a witness in a case in Florida involving the marketing of a pill which allegedly resulted in the malformation of a child. The letter which I wrote to Dr. McBride is attached to this affidavit and incorporated herein. It sets forth the facts as I know them of my personal knowledge and I incorporate the recitation of those facts in this affidavit.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 7th January, 1983.

/s/ G. J. B. CRABB
G. J. B. Crabb
Rear Admiral, Ret.

Declared before me at
Sydney the 7th January 1983

/s/ G. L. NEWTON
G. L. Newton
Solicitor
44 Northcote Ave.
Killara 2071
Phone 498-1541

Attachment to Declaration of Rear Admiral G. J. B. Crabb, Ret. Dated January 7, 1983

Wahroonga. 2076

25th August, 1980

Dr. W. G. McBride,
123 Queen Road,
WOOLLAHRA. 2025

Dear Doctor,

I am writing to you because last week I inadvertently became involved in an incident about which I think you should be informed.

On returning from an inter-state trip on Thursday, 21st August, I found a message on my telephone recorder from a person in Los Angeles. This person inferred that he was a member of the American Society of Industrial Security (to which I belong) and asked me to call him. It was too late for me to do that, but on Friday, 22nd he called from his hotel in Sydney and requested a meeting.

I went to his hotel and immediately on meeting I produced my A.S.I.S. card as identity, but all he produced was a normal business card. It turned out that he had a friend who belonged to A.S.I.S. and as I am the only registered member of that Society in Sydney, they proposed to use me as a local contact.

From the conversation which followed, I understood that a law suit had been held recently in the State of Florida, where a husband and wife sued a pharmaceutical company for producing and marketing a pill which resulted in the malformation of their child. The Jury awarded a mere $20,000 to the parents and nothing to their child. The trial judge ruled a mis-trial and preparations are now being made for a new trial. It is important as a test case.

The person to whom I spoke is working with his wife, on behalf of the pharmaceutical company. He said that you have

agreed to give evidence as an expert witness, and that he and his wife had been sent here to check on your background.

He showed me a paper which contained a summary of your career, together with a list of papers which you have published. He said that a complete copy of the latter was held by his principals in New York who were carrying out a close study of them.

He wanted to get access to any police or civilian court proceedings in which you may have been involved, but I said that that was virtually impossible, and gave him a dissertation on the activities of the Privacy Committee.

There was no doubt in my mind that this couple had been given considerable financial backing to find out as much as possible about you with a view to discrediting you in any way possible.

As they return to the U.S.A. on Wednesday, 27th August, I would not be surprised if they employ a private inquiry agent to follow up their own investigations.

I have no desire to participate in such activities as outlined here, neither do I have any reason to be involved in any action which might damage or hurt you.

I have told the people concerned that I do not wish to be involved any further in their activities and I am very annoyed that I was misled into being used as a local contact in the first place.

You will, of course, understand that the case in question could be likened to that which found against the Distillers Company, resulting in a huge loss to that company. I was told that in this case money is no object in achieving their aim of discrediting new witnesses.

I have tried to keep the information in this letter in perspective so as to warn you of possible personal surveillance without exaggerating the situation.

/s/ G. J. B. CRABB

G. J. B. Crabb.

This and the preceding page is the letter referred to in the declaration of G. J. B. Crabb declared before me at Sydney 7th January 1983

/s/ G. L. NEWTON
G. L. Newton
Solicitor
44 Northcote Ave.
Killara 2071
Phone 498-1541

Second Supplemental Declaration of Richard M. Coleman Filed January 10, 1983

United States District Court for the District of Columbia

(Caption Omitted in Printing)

(Judge Johnson)

SECOND SUPPLEMENTAL DECLARATION OF RICHARD M. COLEMAN IN SUPPORT OF MOTION TO DISQUALIFY COUNSEL, ETC.

I, RICHARD M. COLEMAN, declare:

• • • •

In paragraph 7 of my former Declaration, I stated: "She said that she did not know what to do because she had a lawyer, Carl Schuck, who she thought was a good person but owed favors to the other side and did not want her going back on

anything. All he wanted was to have her go forward and give a statement." • • • •

3. In that context of "not going back", Ms. Janowsky also told me that it was not just Mr. Schuck who wanted to go forward but the other side as well. She said she wanted to say it was "dishonest" but they would not let her go back on her statement to them. • • • •

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California this 7th day of January, 1982 [sic].

/s/ RICHARD M. COLEMAN
Richard M. Coleman

(Certificate of Service Omitted)

Order of the District Court Denying Plaintiffs' Motion to Disqualify Counsel for Witness Filed January 11, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

ORDER

Upon consideration of plaintiffs' motion to disqualify Carl J. Schuck, Esq., as counsel for Krystyna Janowski and Luis

Castillo at their depositions to be taken pursuant to the Court's order of January 6, 1983, and upon defendant's opposition thereto, the accompanying memoranda of law, the various affidavits and declarations, and the entire record herein, it is this 11th day of January, 1983,

ORDERED that the motion of plaintiffs to disqualify Carl J. Schuck, Esq. be, and hereby is, DENIED.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Order of the District Court Requiring Arthur N. Cohen or George Kokus to Appear Filed January 12, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Division

FILED—Jan 12 1983—James F. Davey, Clerk

Civil Action No. 80-1258
(Judge Johnson)

ANNE ELISABETH KOLLER, et al.,

Plaintiffs,

v.

RICHARDSON-MERRELL INC.,

Defendant.

ORDER

Upon the affidavit of Lawrence E. Walsh, sworn to January 12, 1983, it is hereby ORDERED that Arthur N. Cohen, Esq. or George Kokus, Esq. shall appear before this Court on January

17, 1983, and bring with them their files and the files of the firm of Cohen & Kokus relating to the above entitled action, including any communication to or from Cynthia Koller, John Lamont Koller, Roger F. Palmer, Alan Ezrin and James Helm relating to the birth defects of Anne Elisabeth Koller, the alleged use of Bendectin by Mrs. Koller, the pregnancy history of Mrs. Koller, and any other document relating thereto, and any documents relating to Walter Reed Army Medical Center and its Forest Glen Annex ("Walter Reed") and to medical, prescription, bulk order laboratory or other records of the Kollers at Walter Reed.

IT IS FURTHER ORDERED that all said documents be preserved for presentation to the Court at the above designated hearing.

/s/ NORMA HOLLOWAY JOHNSON
United States District Judge

January 12, 1983

Excerpt from United States District Court for the District of Columbia Hearing Transcript of January 12, 1983

[24] THE COURT: • • • •

I have indicated that I will not need the jury on Monday because I had a jury planned for Monday, and I have told Mrs. Angel not to bring the jury panel in. But if we **[25]** can possibly get to pretrial, that is what I would choose to do Monday and Tuesday. • • • •

Excerpts from Deposition of Krystyna Janowski Held on January 12, 1983

KRYSTYNA JANOWSKI, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Struve

[23] • • • • Q. Could you in talking about that product in your discussion with Mrs. Koller give us your best recollection of what was said both by you and Mrs. Koller. A. Well, she looked pale and I thought that maybe the trip was harsh on her and I felt bad that she was under all this pressure because this law suit has been an ongoing thing for a number of years with her and I asked her if she was all right.

I thought maybe there was something else I could do for her, an aspirin or whatever, and she responded that she was all right. She was just worried.

Well, that was understandable because she was about to be thoroughly interviewed by a **[24]** genetic specialist and she knows how crucial a negative genetic report is to her law suit and so she responded well, she was worried and I asked her whether she was worried about the exam or the trial, to try to put her at ease and she said that she was worried, she did not respond what I thought—I thought she would say that she was worried about the hospitalization confrontation. She said that she was worried about the experts. And I was surprised to hear that because that seemed like an out-of-place thing for her to be worrying about at that particular time. The trial was far in the future and could be continued at any time.

And I asked her why was she worried about the experts. How did that have anything to do with it and she said that she was worried whether or not the experts could convince the jury and judge that Bendectin was an agent that had damaged her child. I didn't think that was a problem and I told her so. I thought the problem was to convince the jury and the judge that she had taken Bendectin at the time she was saying she originally had when she knew and we knew that she hadn't.

And she didn't think that was a problem. She said that she didn't think that was a problem because Jim Butler could convince the jury that it was midnight even though the sun was shining **[25]** through the courtroom windows which was really kind of a reputation Jim Butler has. We thought it was both a funny remark and she laughed and I laughed and that lightened the mood a little bit. She looked a little more at ease, a little more comfortable and we had talked many, many times on the telephone so that we were on a first-name basis and I reassured her if there is anything else I can do for you, just let us know. It was not a lengthy conversation but it was a friendly one.

Q. Now when you said in substance that you knew and she knew that she had not taken Bendectin when she said she did, what response, if any, did she make to that? A. Well, I was a little bit angry because this case was putting a lot of pressure on us and I felt that this case had been unloaded on us by a previous law firm and I said to her that we have a problem with this, with convincing the judge and the jury about that. And she didn't respond. She didn't acknowledge my statement by saying well, that is a problem because I didn't take the Bendectin nor did she refute my accusation by saying well, that's a lie, I did take the Bendectin. She tacitly acknowledged what I was saying was right but it is no problem because Jim Butler is going to take care of that. Jim Butler **[26]** is a hell of a lawyer and no one here will disagree with that.

Q. Was there any further discussion between you and Mrs. Koller in the conference room? A. There certainly must have been but it was nothing of great import. We discussed the fact that she was a Christian woman and it gave her strength to deal with some of this and little things like that, nothing of great substance.

Q. Was there any further discussion of the question whether or not she had taken Bendectin at the time she said she did? A. No, it just came up in that one instance spontaneously for a few seconds. It was never touched on again. • • • •

[42] * * * * Q. Now, Mrs. Janowski, coming back to the discussion that you had described, you said that Mrs. Koller said something like—and this is my recollection—"If the experts say that it has **[43]** to have been taken on day 1, then I am going to say that it was taken on day 1."

Did Mrs. Koller say anything else in that telephone conversation any more specifically about when she did take it? A. The only other thing she said she—after she expressed her concern about the constant request for medical authorization releases, for the endless discovery of medical records, she asked me if the questionnaire was going to be examined or questioned. Her voice sounded concerned. I am speculating. I thought she was concerned.

She asked me if they were going to investigate the questionnaire.

I didn't know what questionnaire she was talking about. I asked her which questionnaire.

She said, "The questionnaire they filled out when I first contacted the Florida lawyers."

I knew she meant Cohen & Kokus. This was the first I had ever heard about the questionnaire.

I told her—Nick is always yelling at me not to give legal advice and not to talk like an attorney, but I always forget, and I just answered spontaneously I couldn't imagine that there would be anything for her to worry about. It's just a questionnaire.

[44] She says—Well, she says, "I am worried about the questionnaire because when I first contacted Cohen & Kokus"—she said the Florida law firm, "they gave me, they gave me or sent me a long questionnaire, five or ten pages, and after I filled it out and when they read it, they told me that my answer to the most important question on the questionnaire, 'When did you first take Bendectin,' was wrong, and that I didn't have a lawsuit with that question answered the way it was."

I didn't know what questionnaire she was talking about.

I considered myself relatively familiar with all the records of the Koller case, because I worked on it every day of the week, many hours a day.

I don't recall if I made any comment or injected any words, but she went on to say that—I don't recall the exact words she used, but she said that they had discussed it with her, and she realized that she would have no lawsuit the way it stood.

They helped her to fill out a new questionnaire and then proceeded with the preparation to file suit.

Right at this point I think my mouth kind of dropped open, because what she was saying indirectly was that it was—the facts had been **[45]** rearranged at the very beginning to lay the foundation for a lawsuit.

I felt that what she was saying was that the date at which she had first taken Bendectin had been moved back by the Cohen & Kokus firm in order to place her within that critical period.

Now, as far as Cindy Koller is concerned, she took the Bendectin, and she doesn't care what happens. She's got this determined absolutely. I could hear where she was coming from.

If they said it's got to be taken on day 1, she trusts her lawyer. I trust my lawyer.

If her lawyer tells her, "This is filled out wrong, you have to move the date back." I can understand that, and I accepted that, and later, I went and I searched through all the Koller records to find this questionnaire, and indeed I found it, and it was as she said, a long questionnaire, five or ten pages, and I started reading through it and I came to the question, the obvious question, "When did you first take Bendectin," or something to that effect, and she had written either "Right from the beginning," or "Right from the start," or "Since day 1," I don't recall, but what she had told me, that this was not the original questionnaire, this was a second questionnaire that she had redone at their **[46]** request to put her in the right framework.

I decided at that point I didn't want to work on the case any more. I felt our firm had been tricked into accepting a lawsuit which had a fraudulent base. Our firm would never do anything like that. I felt that these people in Florida, whoever they were, had done something very disreputable.

We had stumbled along and gotten into the case, invested a lot of money. We were spending money, great amounts of

money here. We were committed to going forward with this case. We have got a lot of money invested, millions of dollars riding on the verdict, and here from the very inception of the case there had been fraud on the part of the Florida law firm.

I began to dislike the case and not want to work on it. • • • •

[121] • • • • Q. Now before you made the two calls to Davis, Polk which are reflected in Exhibit A and Exhibit B did anyone approach you and suggest to you that you ought to make those calls? A. No, never.

Q. Did anyone in effect bribe you to make those calls? A. No. As a matter of fact, prior to this you could not have bribed me to make these phone calls for the simple reason for no amount of money would I have gotten myself in so much trouble. Look at this all here. It's terrible. • • • •

[134] • • • • Q. Now, after the meeting with Mr. Ryan and Mr. Barnes on the afternoon of Thursday, December 23, 1982, and putting aside any communications or meetings that you may have had with your counsel, what was the next time that you talked with anyone respecting these disclosures? A. Over the weekend. I got to thinking, I am sitting in my little apartment and I am thinking, trying to weigh the pros and cons of what's likely to result if I continue with my course of angry action.

I came to the conclusion that all hell might break loose, that maybe as angry as I was with the firm, I should try to undo the damage.

I may have wanted to kick somebody in the shins, but I didn't want to sink the whole ship. I **[135]** didn't want to blow the whole lawsuit out of the water. How can I undo the damage I have done? Poor Nick, poor Jim—not poor Jim, but poor law firm. I felt really bad and I decided that maybe I better keep the lid on all this and try to undo the damage I had done, and go back on my statements to Ryan and Barnes.

I panicked at the thought of the extensive damage that might be done not just to the Koller case but to the law firm, because here I am revealing that in my opinion they have engaged in a

course of fraudulent conduct on the court, and I thought that might get blown out of proportion, all kinds of examinations might take place, or even their license to practice law might be challenged.

I thought, I thought over the weekend about the fact that all I wanted to do was make a phone call or two, register my anger, and register a cheer for Davis, Polk, you are on the right track, you are looking in the wrong places. I never intended to have this pop up at the door like jack-in-the-box. I better squash this while I can.

I thought about it over the whole weekend, and I called my office, the office of the Butler firm on Sunday evening after I tried to reach Nick Allis at home. I thought that I will talk to Nick first and privately, and I will ask him, you know, I have jumped **[136]** into the frying pan; get me out.

Nobody answers at home. Nick has got the answering service. I am not going to leave a message on the answering service. I have to talk to a human being.

Another person of judgment and calm head in the firm, Richard Daum. I tried calling Richard Daum at home in Culver City.

No answer.

I figured if Nick is not at home, he's got to be at the office. That's virtually the only place he would be, in the office or at home.

I called the office, and to my delight Richard Daum answers. At least somebody is there besides the answering service. I said something to the effect, "Richard, I am in a hell of a situation. I have got to talk to Nick. Let me talk to Nick."

Richard informs me Nick is not here. "As a matter of fact, I am here. Can I do anything for you? Can I take a message?"

I am thinking to myself, I had expected to get Nick Allis personally. If I had gotten Nick Allis personally, I could tell Nick I had made a phone call to Davis, Polk. I am not going to admit a lot of things that make me look real bad to a junior member, a new member of the firm, a paralegal.

I am thinking as fast as I can, and I **[137]** decided I will lie. I am not going to say that I made the call to Davis, Polk

voluntarily. I will admit that I called Davis, Polk, and I will admit that I gave them damaging information, but I won't admit I did it voluntarily. I will pretend that I was tricked into it, pressured, so I invented a story about somebody having approached me and said they were from Davis, Polk, and threatened me if I didn't cooperate with them I would be sorry.

I invented some fantastic story, and in the middle of the story I was telling Richard I got the truth across, I have talked to Davis, Polk, I have given them some damaging information about what's going on within our firm. I want to backtrack. I wanted to discredit myself, I want to undo the damage. Let's present a united front.

I may not have used those exact words. What I was saying, let's get together and undo the damage I have done.

Richard Daum didn't take me seriously. Maybe my story was too fantastic, I don't know.

Also, maybe Richard Daum wasn't aware what I might have told the firm of Davis, Polk was so explosive.

Richard Daum has only been with the firm for, I am sure, less than a year; certainly was not a **[138]** party to any of these early meetings, strategy meetings in 1981.

Now, of course, you know that Richard Daum is with the firm, he partakes very strongly in all of the attorney meetings because he's our head paralegal, but he seemed not to be concerned.

I asked him, "Find Nick Allis. We can't let this wait overnight."

He said Nick Allis was not there and he said he would try to track Jim Butler down or Nick Allis down.

I impressed on him to find Nick Allis. If he is not at home, he might be with one of his girl friends. I didn't think it could wait until Monday morning.

As you see, I was calling on Sunday night, trying to erase the damage I had done. So much for that night. • • • •

[154] • • • • A. Yes, he was there in the morning from about 10:15 or 10:20 until sometime after 12:15, maybe close to 12:30. And he said he wanted to go back to the office. I

don't recall exactly what his words were but he was going back to the office to work on this problem.

He called me again at the hospital about 3:30, said that he had put his head together with Jim Butler and they had come up with a way to mitigate the possible disastrous consequences of my contact with Davis, Polk.

Nick asked me if I would be willing to sign a statement and I took into consideration all the factors. I didn't want to sign a false statement to the effect that I never had any conversation with Mrs. Koller. I wanted to compromise and sign a statement saying I don't remember ever having had any such conversation. But Nick took a very strong position that in order to undo the damage of my contact with Davis, Polk nothing less would do than a complete contradiction, **[155]** a complete retraction of my original statements. Nick said that they were preparing a statement which would be adequate, they felt, to undo the damage, a complete retraction and they might have it ready and bring it by that evening. • • • •

Memorandum Opinion of the District Court Excluding Evidence of Cordova and Sand Filed January 17, 1983

FILED—Jan 17 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on defendant's motion to exclude all evidence of the birth defects of Marco Cordova and Pauline Sand, two children on whose behalf plaintiffs' attorneys have filed suit in the California state courts for injuries allegedly caused by the drug Bendectin. Because Anne Koller's birth defects also allegedly were caused by Bendectin, plaintiffs plan to have their experts testify that one of the reasons for their conclusions that Anne Koller's birth defects were caused by Bendectin is their examination or review of the case histories of Marco Cordova and Pauline Sand. For the following reasons, the Court will preclude plaintiffs from making any use of the birth defects of the Cordova and Sand children.

Regardless of plaintiffs' intention to employ the Cordova and Sand defects only to buttress their experts' conclusions concerning the cause of Anne Koller's birth defects, there is a significant danger that the introduction of *any* information concerning the Cordova and Sand defects would result in a *de facto* trial of the Cordova and Sand suits. Permitting defendants to exercise their right to cross-examination undoubtedly would force the consideration of a myriad of collateral issues relating to the family histories, medical histories, genetic analyses, and course of pregnancy of the Cordova and Sand children. Plaintiffs attempt to justify their use of this information by analogizing it to the epidemiological studies that defendant plans to employ. Plaintiffs' analogy is seriously flawed, however, because epidemiological studies are conducted pursuant to a scientific methodology which impersonally compares a large group of children whose mothers took Bendectin against another large group of children whose mothers never used the drug. In contrast, the two children whose birth defects plaintiffs seek to cite are among a large group of children who suffered birth defects and whose mothers coincidentally took Bendectin. The Court is unwilling to grant plaintiffs a license to submit the birth defects of children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially

similar to those of Anne Koller.* Hence, the substantial danger of the introduction of collateral issues which would confuse the jury and obfuscate the issues strongly supports the exclusion of any reference to the birth defects of Marco Cordova and Pauline Sand. Moreover, reference to the birth defects of other children would be highly prejudicial to defendant since it would be effectively compelled to defend against the Cordova and Sand suits in addition to Anne Koller's claim.

That plaintiffs are willing to use the birth defects of the Cordova and Sand children solely to support their experts' opinions of the causation of Anne Koller's birth defects does not alter the foregoing analysis. Federal Rule of Evidence 703 permits experts to rely on inadmissable evidence if it is the type of evidence upon which experts in that field traditionally rely. Therefore, the Court must determine if medical experts would reasonably rely on the birth defects of children with similar physiological problems to Anne Koller in concluding that her defects were caused by Bendectin. While it may be possible to point to similar injuries that concededly were caused by a drug to suggest that another individual's injuries were caused by the same drug, the critical point in the instant case is that it has never been proven** that the Cordova and Sand children suffered birth defects due to Bendectin. Thus, plaintiffs will not be permitted to rely upon similar accidents to bolster their view of the cause of the instant accident where it is far from clear that the "similar" accidents were even caused by the same event that allegedly caused the instant accident. Attempting to

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* Under the same ill-found reasoning advanced by plaintiffs, defendant should be entitled to introduce evidence of the birth defects of the Mekdeci child to demonstrate that Bendectin did not cause Anne Koller's birth defects.

** Neither the Cordova nor the Sand suits have been tried. Moreover, defendant has consistently maintained that Bendectin is not a teratogen. Since a court of law has yet to find that Bendectin causes birth defects, it would be a particularly unreasonable decision to permit jurors to infer that Bendectin causes birth defects from other unproven claims that are no more strongly supported than plaintiffs' suit.

base a determination of the causation of a birth defect on the unconfirmed cause of birth defects in other children is, at best, no more than wishful thinking. Accordingly, the Court finds that medical experts would have no reasonable basis to rely on the Cordova and Sand birth defects to support a conclusion that Anne Koller's birth defects were caused by Bendectin.

Assuming *arguendo* that medical experts could reasonably rely on the birth defects of the Cordova and Sand children, any reference to these defects still must be barred. Despite the allegedly limited use of the Cordova and Sand defects by plaintiffs' experts, there is no basis upon which the Court could prevent the introduction of collateral issues, particularly given the serious questions concerning whether the Cordova and Sand birth defects were caused by Bendectin. Finally, the Court rejects plaintiffs' attempts to have the Court place its blind faith in their highly trained experts in trusting them to list every factor that contributed to their conclusions that Anne Koller's birth defects were caused by Bendectin. It is quite clear from the present record that there are an array of factors that plaintiffs' experts will claim that provided their foundation for the conclusion that Bendectin caused Anne Koller's birth defects. Preventing plaintiffs from listing their examination of the case histories of the Cordova and Sand children will have no appreciable impact on the effectiveness of the presentation of plaintiffs' case. In balancing the positions of the parties, together with the earlier articulated serious concerns—including jury confusion—it is necessary that the experts to be called by plaintiffs be barred from making any reference to the birth defects of the Cordova and Sand children.

An Order consistent with this Memorandum Opinion will be entered this date.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

DATE: January 17, 1983

Order of the District Court Excluding Evidence on Cordova and Sand Filed January 17, 1983

FILED—Jan 17 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

ORDER

Upon consideration of defendant's motion to exclude any evidence of the birth defects of Marco Cordova and Pauline Sand, plaintiffs' opposition, the accompanying memoranda of law, the argument of counsel, and the entire record herein, it is this 17th day of January, 1983,

ORDERED that defendant's motion be, and hereby is, granted.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Affidavit of Carol Freeman Filed January 18, 1983

United States District Court
for the District of Columbia

STATE OF TEXAS:
COUNTY OF HARRIS:

My name is Carol Freeman. I am over the age of eighteen (18) years of age. I am employed by Richard Warren Mithoff, as a secretary, with the firm of Jamail, Kolius & Mithoff at 3300 One Allen Center, Houston, Texas 77002.

On Monday, December 27, 1982, I received a call from Krystyna Janowski. During the course of the conversation Krystyna told me that she had been contacted by the defense—an investigator—in the *Koller* case. She had his card. The investigator wanted her to remember a telephone conversation which had been transcribed. Krystyna told me she didn't remember the conversation because the conversation had never taken place. She also told me that they had offered her money to testify: $5,000.00 now, $5,000.00 when she testified and $5,000.00 afterwards. We discussed it being a lot of money. I asked Krystyna where they had contacted her and she told me once outside of the hospital and once at her home, and that she didn't know how they got her home address. They knew that she had a new baby and that the baby was in the hospital and that she had some expenses. They had made reference to the expenses. I told her she needed to tell Nick and if the defense or anyone else wanted to talk to her she should not talk to them, unless of course she was served with a subpoena.

THE ABOVE AND FOREGOING IS TRUE AND CORRECT.

/s/ CAROL FREEMAN
Carol Freeman

SUBSCRIBED AND SWORN TO this the 17th day of January 1983, to certify which witness my hand and seal of office.

/s/ CAROL H. YARBROUGH
Notary Public in and for
The State of Texas

My commission expires:

CAROL H. YARBROUGH
My Commission Expires September 11, 1985

Excerpts from United States District Court for the District of Columbia Hearing Transcript of January 18, 1983

[20] THE COURT: • • • •

In fact, Mr. Eaton asked me on Friday if the jury would be coming in today. I told him, specifically I had told the jury officer not to bring the jury in Monday or Tuesday, that I would do my pretrial before I had the jury brought in for impaneling in this case. But you are correct, I do perceive that some issues have arisen which may impact somewhat on the trial date, but as all of you gentlemen know, I have set aside the full months of January, February and March on my calendar for the trial of this case. • • • •

[34] • • • • MR. BUTLER: Your Honor, we feel that not only should that have been done but also independent counsel appointed for this woman.

THE COURT: Well, let me say this to you, Mr. Butler. I know your position on that. I have read your papers on that, and I would quite agree with you that it might have been worthwhile to get independent counsel, but neither you, Mr. Madole nor anyone else offered this Court **[35]** one penny to pay independent counsel for the lady.

Secondly, I was sending a special master out to conduct this deposition, and based upon what I have read of the transcript, the deposition was conducted—

MR. BUTLER: Was what?

THE COURT: The deposition was conducted by the special master. Based upon my reading of the transcript, it was conducted by the special master.

To my knowledge, this lady needed no counsel during the taking of that deposition, unless that counsel felt that something she might say or some question that was asked of her would elicit the type of information that she might have a Fifth Amendment right not to speak on, and based upon what I have been able to read, this lady was examined by Mr. Struve and cross-examined by Mr. Campbell and the counsel who she said she wanted to represent her during the course of that proceeding—

MR. BUTLER: Your Honor, counsel—I'm sorry.

THE COURT: The counsel who she said she wished to represent her during that proceeding did no more than represent her interest. It did not have anything to do with the issue before this Court. And, as I said, whether you agree or disagree, the full matter was put before me. I read papers from both sides and I did what any judge does. I made a decision. So, it's been made, all right.

[74] • • • • THE COURT: Well, thank you, but let me say this. With respect to the attorney/client privilege, why don't you gentlemen let me look into it with respect to all witnesses except Janowski and Castillo, because I do believe that what Mr. Madole stated in here on the record that day related primarily to Janowski and Castillo. I will review the transcript. I will also review the case law on that issue, but I am reopening discovery now for the limited purpose of any further deposition of Mrs. Koller that you choose, of any further deposition of Mr. Koller that you choose, of any further deposition—not further deposition but any **[75]** deposition of Mr. Humphries.

Now, are those the only people you asked for?

MR. WALSH: The only three we asked for. We suggested the addition of Rochelle Beeber, but that's a belated addition.

THE COURT: I think before I move—well, let me get these names down. I think with respect to the—I forget the last name already but the first name was Rochelle.

MR. WALSH: Rochelle Beeber, B-e-e-b-e-r.

THE COURT: I think I'd better get something in writing on that before I consider that. I will hear from you and then I will hear from the other side with respect to Beeber.

Now, as far as Mr. Butler is concerned, Mr. Butler wants to depose Barnes.

MR. BUTLER: Larson.

THE COURT: You say husband and wife?

MR. BUTLER: That's right.

THE COURT: What are the first initials?

MR. BUTLER: George and—what is Mrs. Barnes' first name?

MR. WALSH: I don't know—Nancy.

THE COURT: George and Nancy Barnes you asked for. Who else?

MR. BUTLER: And Mr. Larson.

[76] MR. WALSH: Lawrence Larson. I think he calls himself Larry Larson.

THE COURT: All right.

MR. BUTLER: Larry Larson. Your Honor, we served a subpoena on Upjohn with respect to her employment record. I think that that is important. She was with Upjohn before she came with me. • • • •

[85] • • • • Based upon the frame of mind I was in, I thought we should just start with the pretrial today, but I sort of get the impression that you would prefer not to, Mr. Butler. Am I correct?

MR. BUTLER: That's correct, Your Honor. I would want to get this matter out of the way, the matter of Krystyna Janowski, before we proceed.

THE COURT: Do you have any objections to my just pushing this over until the end of next week?

MR. WALSH: None at all, Your Honor. We are ready to accommodate any suggestion Your Honor has or any scheduling order Your Honor has.

THE COURT: All right. Assuming—I'm not assuming. I'm sure the deposition of Ms. Janowski and Mr. Castillo will be

over by the 28th of January. I'm sure of that. Already Mr. Coleman has indicated that he is sure he can finish in two days, and I would doubt if Mr. Castillo's deposition would take two days. But, at any rate, assuming that it will be over on that date, your next day in this courtroom will be Monday, January 31st. • • • •

Memorandum Opinion of the District Court Affirming Ruling Regarding Attorney-Client Privilege Filed January 19, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED—Jan 19 1983—James F. Davey, Clerk

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, et al.,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on plaintiffs' assertion of the attorney-client privilege with respect to discussions between plaintiffs and their attorneys concerning when Cynthia Koller ingested the drug Bendectin during the course of her pregnancy with Anne Koller. Plaintiffs appeal the ruling of this Court's Special Master, the Honorable Gerard D. Reilly, Chief Judge, Retired, District of Columbia Court of Appeals, that plaintiffs no longer possess an attorney-client privilege with respect to any of the aforementioned discussions. Whether as a matter of

the law of the District of Columbia or California,* this Court affirms the Special Master's ruling on two independent grounds: 1) The exception to the attorney-client privilege for an alleged fraud upon the Court is clearly applicable; 2) Plaintiffs' selective waiver of the attorney-client privilege with respect to one alleged critical discussion had the legal effect of totally waiving the privilege. While the Court will not tolerate a fishing expedition into the strategies of plaintiffs' attorneys in this litigation, the Court holds that plaintiffs possess no attorney-client privilege to prevent the disclosure of any discussions relating to the issue of when Cynthia Koller took Bendectin during her pregnancy with Anne Koller. The Court and the litigants are entitled to a full inquiry into the serious allegation that a fraud has been committed upon the Court.

Before discussing the two grounds for this Court's holding, it is necessary to discuss briefly why Cynthia Koller's alleged communication with Krystyna Janowski normally would be protected by the attorney-client privilege. Ms. Janowski was a legal secretary for one of plaintiffs' attorneys when her alleged discussion with Ms. Koller occurred. There is no doubt that Ms. Koller was willing to share her thoughts with Ms. Janowski because Ms. Janowski was an agent for one of her attorneys. Accordingly, a conversation between a client and her attorney's agent should be privileged. Defendant's only argument to move this alleged conversation outside the normal scope of the attorney-client privilege is unpersuasive. Defendant relies on several cases in which an attorney hired a consultant or investigator who concluded that the client's case had no merit. These conclusions were found to be unprivileged since they were not obtained for the purpose of obtaining legal advice. *See, e.g., Jasper Construction, Inc. v. Foothill Junior*

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* It is likely that the controlling law is from the District of Columbia since the District of Columbia is the forum state and has a substantial interest in governing the conduct of attorneys who appear in its courts. Nevertheless, it is unnecessary to make a substantive ruling on this conflicts of law issue since the laws of the District of Columbia and California compel the same result.

College District, 91 Cal. App. 3d 1, 153 Cal. Rptr. 767 (1st Dist. 1979). The instant case is readily distinguishable, however, because it is one of the plaintiffs, not an agent hired by the attorney, who allegedly has made statements that would undercut the case and that would suggest that a fraud has been committed upon the Court. Although the link of Ms. Koller's alleged comments to the pursuit of legal advice is somewhat attenuated, the fact that Ms. Koller's alleged statements were made to an individual whom she knew was her attorney's agent during a visit to that attorney's law firm should, under normal circumstances, shield Ms. Koller's comments from disclosure.

The first reason why the protection of the attorney-client privilege must be removed is that the privilege cannot be employed to thwart an inquiry into allegations that a fraud has been committed upon the Court. In the instant case, Ms. Janowski has made serious charges that at least require some further inquiry. The seriousness of these charges* combined with a record that indicates that certain documents that would help answer when Ms. Koller did take Bendectin are unavailable strongly support the conclusion that this case squarely fits within the fraud exception to the attorney-client privilege. Otherwise, any further inquiry into Ms. Janowski's charges could be blocked by the assertion of attorney-client privilege. Where the Court cannot conclude that allegations of fraud are frivolous or manufactured, the fraud exception to the attorney-client privilege must be applied to permit a complete investigation of the charges.

Plaintiffs' attempts to avoid the application of the fraud exception are ill-founded. Plaintiffs cite a California decision for the proposition that there is no exception to the privilege when an attorney misuses confidential information to defraud others where there is no allegation that plaintiffs ever had a fraudulent motive in employing their attorneys. *See Glade v.*

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* Of course, the seriousness of a charge of fraud alone does not necessitate the application of the fraud exception if the charge appears frivolous. Yet, the Court is not in a position to find Ms. Janowski's charge either frivolous or manufactured at this time.

Superior Court, 76 Cal. App. 3d 738, 143 Cal. Rptr. 119 (3d Dist. 1978). While this legal proposition may be true, it is wholly inapplicable to the instant case where Ms. Janowski has alleged that a plaintiff, Ms. Koller, has intentionally committed a fraud upon the Court by falsely claiming that she took Bendectin during the critical period for limb development.* Plaintiffs also maintain that the fraud exception is inapplicable since plaintiffs did not have a fraudulent motive in seeking legal advice. Yet, the fraud exception applies during the entire course, not merely at the inception, of the attorney-client relationship. Regardless of plaintiffs' attitude when they first obtained counsel, Ms. Janowski has alleged that Ms. Koller admitted that at some point she falsified her claim regarding when she ingested Bendectin during her pregnancy.**

An independent basis for not honoring the attorney-client privilege is that plaintiffs' selective waiver of the privilege mandates that the privilege is completely waived with respect to the issue of when Ms. Koller took Bendectin. In a hearing before the Court on January 4, 1983, plaintiffs' counsel waived the attorney-client privilege for Ms. Janowski's alleged conversation with Ms. Koller concerning when Ms. Koller first took Bendectin. That selective waiver opens the door to a full exploration of the subject matter of the conversation through an inquiry into any other discussions that Ms. Koller may have had with her attorneys or their agents regarding this subject. There is ample authority that selective waiver of the attorney-client privilege effectively waives the privilege entirely for the subject matter of the selective waiver. *See, e.g., United States*

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* Moreover, the *Glade* decision required that the client was unaware of the attorney's wrongdoing. This contrasts starkly with Ms. Janowski's allegations that suggest that Ms. Koller initiated or at least fully cooperated in the alleged fraud.

** Plaintiffs' assertion of the work-product privilege must be rejected for the same reasons as the attorney-client privilege must not be recognized. The fraud exception necessarily extends the work-product privilege, a privilege which is arguably deserving of less respect than even the attorney-client privilege.

v. Woodall, 438 F.2d 1317, 1324-24 (5th Cir.) (en banc), *cert. denied*, 403 U.S. 933 (1971); *Handguards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976); *Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543, 551 (D.C. 1981). Plaintiffs' argument that a complete waiver should occur only when there is an "offensive" selective waiver is meritless. A distinction between the "offensive" and "defensive" use of otherwise privileged materials, however, is meaningless. The principle that selective waiver completely waives the privilege for the subject matter of the selective waiver emanates not from the manner in which the selective waiver is employed, but rather from a strong sense of fundamental fairness. Once counsel opts to disclose some privileged information about a particular issue, additional disclosure is essential to permit a full consideration of the issue.

An Order consistent with this Memorandum Opinion will be entered this date.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Date: January 19, 1983

Order of the District Court Affirming Ruling Regarding Attorney-Client Privilege Filed January 19, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED—Jan 19 1983—James F. Davey, Clerk

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, et al.,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

ORDER

Upon consideration of plaintiffs' motion to reverse the ruling of the Special Master that the attorney-client privilege is inapplicable to any conversations concerning the issue of when Ms. Koller took Bendectin during her pregnancy with Anne Koller, defendant's opposition, and the entire record herein, it is this 19th day of January, 1983,

ORDERED that the Special Master's ruling be, and hereby is, affirmed; and it is further

ORDERED that this ruling shall apply to all other depositions and testimony that will be taken to explore whether a fraud has been committed upon the Court.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Excerpts from Deposition of George Barnes Held on January 25, 1983

GEORGE BARNES, called as a witness by the Plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Eaton

[62] • • • • Q. Prior to December 22, 1982, had you ever seen Krystyna Janowski? A. No, sir.

Q. Had you ever spoken to her prior to December 22nd? A. No, sir.

Q. Had you ever spoken to any person from the Butler firm, to the best of your knowledge, prior to December 22nd? A. Not to the best of my knowledge, sir.

[119] • • • • Q. Who were the people who carried out the surveillance? A. Myself, Richard Harrison. That's it.

[120] • • • • Q. And was this 24 hours a day? A. No.

Q. How many hours a day, approximately, sir? A. It's hard to say. Probably less than eight.

Q. Less than eight hours? A. I would think so, except on the 3rd, it was considerably longer.

Q. Was it all done from the one vehicle? A. No, no, we used various vehicles because the neighborhood is difficult to work in, and we had obtained authority to rent a camper, a recreational-type vehicle that we could sit in and there were restroom facilities there. So, we could be there relatively early in the morning and be able to maintain that position. We were not to follow her or anything, just make sure that nothing happened, and not impose upon her.

[II-48] • • • • Q. To your knowledge, have any payments been made to Ms. Janowski or to any other person on her behalf for subsistence or payment of medical expenses? A. By the Defendant?

Q. Or any person or related person acting on its behalf. A. I want to make sure that I understand your question because it's a serious question.

Q. Yes, sir. A. Do you want me to repeat it as I understand it?

Q. Yes, sir, that might be worthwhile. A. As I understand, you're asking me whether or not the Defendant or any of its agents at any time— Q. Or attorneys, agents or attorneys. A. —or attorneys offered subsistence, medical payment, or any other kind of payment to Krystyna Janowski. That's the question?

Q. Yes, sir. **[II-49]** A. No, sir, I have no knowledge of that. I did write one check to Krystyna Janowski.

Q. And that was for the witness fee? A. Yes, sir. $40.

Q. Did she ever express any need to you other than what you've previously described on the 27th and on the 3rd? A. No, sir, not a need that she would even imply that we could fulfill. • • • •

Excerpts from Continued Deposition of Krystyna Janowski Held on January 27, 1983

Cross Examination by Mr. Coleman

[1223] THE WITNESS: Counsel, you are asking about money. I have not received any money, but stop me if I am saying something I shouldn't—

JUDGE REILLY: Wait a minute.

MR. SCHUCK: I am going to make a statement for the record on this subject which I think might help everybody. I wrote a letter under date of January 5, 1983, a copy of which I will be glad to have marked, addressed to Mr. Butler, Mr. Coleman, Mr. Walsh and Mr. Lewis in which I stated, among other things: "Gentlemen, please be advised that in addition to representing Krystyna Janowski I was also asked by Luis Castillo to act as his attorney and I accepted."

Then there is a paragraph about asking people not to contact these folks.

There is a final paragraph: "This confirms my suggestion to Messrs. Coleman and Walsh yesterday made yesterday that the parties share Ms. Janowski's actual living expenses until she can find new employment, hopefully within a month or two.

She is now without income, has no savings, and is confronted with a desperate situation in connection with her still-hospitalized baby. I explained I would be amenable to any reasonable way of monitoring the distribution of funds. I would appreciate your response to this suggestion."

[1224] I will represent that subsequent to this time, and as I told everybody here, I have not told Ms. Janowski where the money was coming from so as not to make her favor one side or the other, but I will say that through my auspices I have arranged for her to be in an apartment, in a security apartment facility to protect her from being harassed.

I have also arranged for her to have a rental car because she was being followed even by a Winnebago in the other car that she had so the people could chase around the other car all they wanted.

And thirdly, I arranged to advance the funds of about three or four hundred dollars in order to get for her baby a cardiac monitor and apnea monitor mattress so the baby could come out of the hospital because the baby was actually having cyanotic spells and stopping breathing, and I arranged for that.

I expect to be reimbursed out of the insurance money when it comes. I believe on the apartment her mother—and incidentally, the baby care right now when she is involved here is strictly being taken care of by her mother who has flown out here, not at our cost or anything. Ms. Janowski has taken care of it. I believe when her mother arrived here, her mother advanced some $50 to make a deposit on this **[1225]** security apartment. That as well as the deposit on the thing has been taken care of through my auspices. I am not going to tell Miss Janowski where that money is coming from on one side or the other but I have suggested it to both.

Now I think I have covered it 100 percent. Have I stated it correctly?

THE WITNESS: In the meantime I am still incurring all the regular costs.

MR. SCHUCK: Beyond that, she still has her present apartment on Bixel Street. She has all of the expenses. Not one

penny of that Bixel Street Apartment rental has been taken care of through my auspices. Not one penny of plane fare has been taken care of, and that's the actual situation.

MR. COLEMAN: Judge, I want to know how much money that she has received from outside sources in this case.

MR. SCHUCK: I haven't given her any.

THE WITNESS: But I have received funds. * * * * * * * * MR. SCHUCK: I will be very happy when I have the figures to put them in the deposition.

I can say right now as a wild guess, it probably ran at an average level for the apartment facility, facilities, an average of about $35 a day. That's a crude average. I don't know what the rental-car cost is. I haven't even gotten the bill yet.

What the blanket cost is, somewhere in the area of $400. I don't even know what the amount is. I didn't handle these things.

[1227] MR. COLEMAN: Is there a month's lease on the apartment or longer lease?

MR. SCHUCK: I don't even know that.

MR. COLEMAN: Is the monthly rent on the apartment in excess of $1,000?

MR. SCHUCK: No.

MR. COLEMAN: $35 a day for the apartment comes out to over $1,000 a month.

MR. SCHUCK: She says it is 615 a month.

MR. COLEMAN: How much was the rent on the Bixel apartment?

THE WITNESS: It still is. 210 a month. I have to pay that every month. I am going back there whenever this gets over with.

Q. BY MR. COLEMAN: Do you have a driver's license?

A. Of course. California. I have it with me, if you would like to see it.

MR. SCHUCK: No. Don't volunteer.

Q. BY MR. COLEMAN: What kind of a car do you own?

A. I still own—

MR. STRUVE: Your Honor, I question the relevance this kind of intrusion into the witness' personal life.

MR. COLEMAN: She is being financed as a **[1228]** professional witness and I can't inquire into it?

MR. SCHUCK: That is ridiculous, and I resent it.

MR. COLEMAN: It is not.

MR. SCHUCK: She needs protection because people were on her back—

MR. COLEMAN: That's not true, not our folks.

MR. SCHUCK: Absolutely true.

MR. COLEMAN: Not true.

MR. SCHUCK: That woman needs protection. She had a baby that was dying and I took care of her.

MR. COLEMAN: She didn't need protection. She needed independent counsel and she didn't get one. She got one paid for by the defense, and she is getting an apartment—who paid for this stuff?

MR. STRUVE: Your Honor, would you ask counsel to control his—

JUDGE REILLY: Yes, yes, please calm down.

MR. COLEMAN: May we take a break, Your Honor?

JUDGE REILLY: Yes.

MR. COLEMAN: Five minutes.

(Brief recess.)

MR. COLEMAN: Your Honor, may we proceed?

JUDGE REILLY: Yes, proceed, Mr. Coleman.

MR. COLEMAN: Your Honor, I do want to get on the record who was making these payments, because I don't think it takes very much guesswork on the witness' part **[1229]** to figure that out. So I do want it on the record, who is making these payments.

MR. SCHUCK: If you want it, then I will say it. The plaintiffs' side is not contributing. It is made, I guess—I will be sending the statements to Lawrence Walsh, who I guess is not with Davis, Polk but he is with—

MR. STRUVE: Crowe & Donlevy.

MR. SCHUCK: —Crowe & Donlevy.

MR. COLEMAN: I think we should be informed how much money is being spent, and I think Mr. Schuck did agree to do that.

MR. SCHUCK: I certainly will. Leave a space here and I will give you an accounting of—

MR. COLEMAN: Thank you, sir.

MR. SCHUCK: —of the disbursements for those purposes through my auspices. • • • •

Redirect Examination by Mr. Struve

[1277] • • • • Q. Could you tell us where you can identify the things that are left out? A. Yes. On the bottom of the page 9 where it says "end side 1 of tape." And then again at the bottom of page 16 where it says "end of tape." There was considerable conversation in both of those areas.

Q. Could you give us to the best of your recollection the conversation that took place between pages 9 and 10. A. Yes. Floyd had gone out of the apartment. I assumed he went downstairs to his car. He was gone such a length of time that I assume he had gone to the corner to use the public telephone, and I asked Nick **[1278]** whether I was doing all right, was this going the way he wanted to, because we had an agreement in the afternoon that he was going to bring by.

MR. STRUVE: Could I ask that counsel not be reacting the way he is to the witness' testimony.

JUDGE REILLY: Yes. Please let the witness—

MR. STRUVE: I am sorry, I interrupted, Miss Janowski. Could you continue.

THE WITNESS: Yes. Nick and I had made an arrangement between ourselves in the afternoon that in exchange for this document I would be kept on the company payroll, my checks would continue indefinitely, I would not have to go to the office, my insurance benefits would continue. A promise was made that no retribution or vindictiveness would be displayed to me for the trouble I caused for the firm, et cetera.

When Floyd left the room I grabbed the opportunity to talk privately.

"Nick are you sure that you are going to keep your part of the deal in exchange for signing this paper? I am not going to have any more problems and is this okay?"

I was confirming during this conversation what I had agreed to with Nick in the afternoon; namely, he was going to come by with a third party in front of whom Nick and I would put up a united front so that **[1279]** they would have a document with which they could defend themselves against the charges by Davis, Polk, and the moment Floyd left the room I grabbed that opportunity to discuss with Nick, "Look, am I doing okay? I am keeping my part of the deal. Will this really end the problem?"

And subsequently we got into discussing again the problems that I had had in the office, and Nick brought up the subject of, "My God, you know, what cracked you to the point where you would actually pick up the phone, call the enemy?"

I launched into a recounting once again of my complaints for several minutes, and by the time Floyd came back in the room, we were talking again about my problems with the law firm, and the side two picks up at that point where Floyd walked into the apartment again, but what's interesting to me is that apparently both sides— • • • •

[1288] THE WITNESS: The statement was that they would destroy me with my own past. That was the threat made to me.

Q. Who made that threat to you? A. It wasn't phrased as a threat. It was a warning. It was more of a warning than it was a threat. On the afternoon of the 27th Nick warned me that I had to cooperate. I felt very pressured, and he said you've got to cooperate because if you don't cooperate with the firm and put up a united front they will bring up everything they can dig up from your past and they **[1289]** will destroy you with it. I was aware that I had a very unsavory past and I was very intimidated with that, and I agreed that I would sign whatever paper he would bring to my apartment, including a blank piece of paper. • • • •

Excerpts from Exhibit 76 to Deposition of Krystyna Janowski Held January 27, 1983*

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

No. CR 9338

March 25, 1966

THE PEOPLE OF THE STATE OF CALIFORNIA

vs

CRYSTAL DAWN HICKS

PROBATION OFFICER'S REPORT

COMPLAINT:

On March 11, 1966, defendant entered a plea of guilty of a violation of Section 245 PC (Assault with a Deadly Weapon) and is at liberty on bail of $1,500 pending a probation hearing scheduled for March 25, 1966.

COUNT FOUR of a Complaint filed February 10, 1966, charged that on February 8, 1966, the defendant did assault Kathleen Helena Smith with a deadly weapon.

Counts One, Two, Three, Five and Six of the Complaint were dismissed in the furtherance of justice.

* This exhibit material was placed under seal by the Special Master presiding over the deposition of Ms. Krystyna Janowski, The Honorable Gerard D. Reilly, Retired Chief Judge, District of Columbia Court of Appeals. Respondents reprinted portions of this exhibit in the Joint Appendix submitted to the Court of Appeals below without obtaining an Order unsealing it. They likewise have designated the following portions of this exhibit for inclusion in the Joint Appendix herein.

Counts One, Two and Three charged that on February 8, 1966 the defendant did assault Daniel Allen Smith, Janice Elizabeth Smith, and Joseph Henry Marquette, with a deadly weapon.

Count Five charged that on February 8, 1966, the defendant did disturb the peace and quiet of the neighborhood of 6465 Seascape by offensive conduct and the use of indecent language in the presence of women and children.

Count Six charged that on February 8, 1966, the defendant did injure or destroy certain property belonging to Kathleen Helena Smith.

The defendant was arrested on February 8, 1966, and posted bail on February 12, 1966, thus spending four days in custody.

• • • •

FACTS OF THE OFFENSE:

On February 8, 1966, at about 2:30 in the afternoon, Kathleen H. Smith reported to police that her house at 6465 Seascape had been entered and extensive damage had been done to the windows, doors, walls, household furnishings and general household interior. She also reported that while discussing the matter with her landlord, Mr. Floyd Hicks, his wife, Crystal Dawn Hicks, tried to run down with her automobile Mrs. Smith, Mrs. Smith's two children, ages five and three and Mrs. Smith's small brother, Joseph Marquette, age three.

Mrs. Smith's mother and father, Mr. and Mrs. Edward Marquette, first noticed that the offense was being committed. At about 11:00 or 11:30 in the morning of February 8 they had driven to their daughter's home. There was a car parked in the driveway as they sat outside in their own automobile and waited for a while. After a few minutes, a woman came out of the house, looked at them and then went back into their daughter's home.

• • • •

ADDITIONAL INFORMATION:

The husband states that she really needs psychiatric help. He never really wanted to commit her, and states that Dr. Irving Stone, psychologist, said that defendant should not be confined in a mental institution because of her past record of institutionalization and that she would continue to reject help if institutionalized. He will pay for continued psychiatric treatment. In view of the marital history, the Probation Officer inquired whether or not he would be willing to put some money in a trust fund for paying of such treatment. The husband called at a later time to inform the Probation Officer that he thought he could place approximately $600 in such a trust fund, meanwhile continuing to make the current payments.

• • • •

RECOMMENDATION:

It is, therefore, respectfully recommended that imposition of sentence be suspended, that defendant be placed on probation for a term of five years, on the condition that she spend the first 30 days in custody of the Sheriff of San Diego County, that she forthwith surrender her California operator's license to the Court for forwarding to the Department of Motor Vehicles for revocation, and that she not drive or operate a motor vehicle without first being duly licensed by the Department of Motor Vehicles of this state; that she abstain from the use of intoxicating beverages, and that she not frequent places where they are the main item of sale, including premises owned or operated by her husband; and that immediately upon her release from custody she resume psychiatric treatment and continue in such treatment unless released by the therapist or this Court.

Respectfully submitted,

CHARLES T. G. ROGERS
Chief Probation Officer

By: /s/ MARY GELL
Mary Gell
Assistant Probation Officer

Approved MARY GRAHAM
Mary Graham
Supervisor

I have read and considered the foregoing report of the Probation Officer.

/s/ CONYERS
Judge of the Superior Court

MG:rsi

Memorandum Opinion of the District Court Excluding DERs Filed January 31, 1983

FILED—Jan 31 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

MEMORANDUM OPINION

This matter is before the Court on defendant's motion to exclude drug experience reports (DERs) maintained by the Food and Drug Administration (FDA). The FDA requires all drug manufacturers to keep records of adverse drug reactions that are reported by consumers. These manufacturers must file periodically with the FDA any DERs, which include any materials concerning an incident of an alleged adverse drug

reaction, that have been collected. Defendant seeks to bar plaintiffs from introducing the approximately five hundred DERs referring to Bendectin to prove either that defendant had notice that Bendectin causes limb defects or that Bendectin causes limb defects. Hence, the Court must determine whether the DERs can be introduced to show notice as an element of punitive damages and to support causation by linking Bendectin to limb defects. With certain restrictions to protect against prejudice to defendant and to limit collateral issues, plaintiffs will be permitted to employ the DERs on the issues of notice* and causation.

Defendant's initial argument to block the use of the DERs is that they are inadmissible hearsay. Although defendant's argument merits serious consideration, the Court finds that a series of exceptions to the hearsay rule remove the DERs from the realm of hearsay. At the outset, it is uncontested that the DERs are composed largely of out-of-court statements of individuals to physicians concerning a variety of problems that have been experienced after the ingestion of Bendectin. The physicians compile the comments and then send this information to defendant. Defendant is legally obligated to retain these reports and periodically submit them to the FDA. Thus, because the DERs are out-of-court statements offered for the truth of the matter asserted,** they constitute hearsay unless hearsay exceptions are applicable.

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* If the Court grants defendant's motion for summary judgment on the issue of punitive damages, then the issue of notice will no longer be relevant.

** At various points in this litigation, both plaintiffs and defendant have urged the Court to distinguish between the issues of notice and causation in the resolution of various legal problems. Technically, using the DERs on the issue of notice would not constitute offering an out-of-court statement for the truth of the matter asserted. After further reflection, however, it appears that the unusual nature of the allegations in the instant case makes distinguishing between the issues of notice and causation for evidentiary rulings an artificial exercise. In the typical case, plaintiff cites prior tortious incidents and suggests that the occurrence of these incidents demonstrates that defendant was aware of the risk and declined to take obvious precautions to prevent future accidents. For example, the fact that an auto manufacturer

The DERs can be characterized as presenting an evidentiary problem of either double or quadruple hearsay. Because two of the steps in the analysis are uncontested,* the DERs will be viewed as creating a classic problem of double hearsay. Defendant first argues that the physician's recording of a patient's experience with Bendectin cannot qualify as a business record because the recording of potential causes of birth defects is not

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was aware of accidents in which gas tanks exploded during collisions and failed to take inexpensive precautions could support an award of punitive damages. In that case, however, no one claimed that it was impossible for the gas tank to explode regardless of the severity of the collision. As a result, the considerations in a determination of punitive damages were the seriousness of the risk, defendant's awareness of the risk, and what remedies could the defendant have employed. In contrast, the issue of notice in the instant case as perceived by plaintiffs would appear to assume away the issue of causation; *i.e.*, a showing of notice initially requires a demonstration that available information supports a finding that Bendectin causes limb defects. Yet, defendant has consistently maintained that Bendectin is not a teratogen and has never caused any limb defects. Hence, until plaintiffs make a sufficient showing on the threshold issue of causation, defendant can undeniably maintain that it had no notice or knowledge of Bendectin's teratogenicity. Therefore, this discussion has demonstrated that the use of the DERs to show notice implicitly requires reliance on the truth of the out-of-court statements upon which the DERs are based.

* After the physician records the information conveyed to him, he sends the materials to defendant who eventually transfers the reports to the FDA. It is not challenged that the DERs are one type of business records maintained by defendant pursuant to statutory mandate. Once these records are transferred to the FDA, they become public records. Whether viewed as business or public records, the DERs qualify as hearsay exceptions with respect to their treatment by defendant and the FDA. A double hearsay problem concerning the physician-recorder and the patient-reporter remains.

A more likely analytical approach to the DERs in the possession of the defendant and the FDA is to analogize to a showing of a chain of custody in a criminal case. The DERs are complete once defendant has collected all the materials submitted regarding an incident of an alleged adverse drug reaction. As a result, the legal problem is not truly one of hearsay, but rather a need to be assured that the DERs have not been altered once they are completed. The statutory obligation to maintain the DERs and to transfer them to the FDA where the DERs become public records readily satisfies this concern for the integrity of the DERs.

a regular business activity. Initially, the Court rejects defendant's unarticulated assumption that birth defects are so rare to physicians that reports about such defects are not routine matters. In fact, that assumption contradicts defendant's recurring argument that birth defects naturally occur relatively often. Moreover, the Court does not accept defendant's myopic view that focuses only on the treatment of birth defects. Physicians routinely record a patient's medical history, including the ingestion of various drugs, after a medical problem has resulted. Thus, the hearsay exception for business records does apply to the physician's recording of his patient's comments after the patient's child has been born with birth defects.

While the physician-recorder qualifies for a hearsay exception, the DERs still cannot be admitted unless the patient-reporter also qualifies for a hearsay exception. Defendant contends that the patient's statements cannot be construed as statements of past physical condition to obtain medical diagnosis or treatment because the statements are nothing more than accusations of fault after birth defects have occurred. Yet, the patients who initiated the DERs that involve Bendectin generally are no different than individuals who fear they have been injured by other products. The overriding objective of most of these individuals in consulting their physicians is to obtain medical treatment or diagnosis. These individuals have strong incentives to discover the cause of the birth defects so that they will not suffer birth defects in the future (*e.g.*, genetic causes) or so that others will not suffer similar consequences. Accordingly, the DERs are not inadmissible hearsay by virtue of the combined application of the hearsay exceptions for business records and statements of past physical condition for the purposes of medical treatment or diagnosis.

Defendant's concern for the accusatory motivation for some of the DERs cannot be ignored. There are less drastic measures than exclusion of the DERs, however, that can protect against defendant's concern. At a minimum, explicit accusatory language, *e.g.*, "Bendectin caused this birth defect," will not be

admissible. The DERs merely may reflect that Bendectin was taken and that birth defects were later suffered. In addition, the Court concludes that the danger of self-serving comments increases as the time between the observation of the birth defects and the filing of the DERs lengthens. Consequently, plaintiffs may select representative DERs that were initiated no greater than one year after the birth of the child that suffered the birth defects.*

Defendant's remaining argument to exclude the DERs is that they are not relevant to the issues of notice and causation. Defendant maintains that the DERs are not probative because approximately two percent of all births naturally involve birth defects. In addition, defendant complains that the number of DERs has been inflated because the plaintiff's bar has been encouraging the public to file DERs concerning Bendectin. Neither of defendant's contentions stand for the proposition that the DERs are not relevant. Defendant's reliance on a natural birth defect rate and a natural rate of limb defects has already been rejected as a basis for summary judgment and the reasoning previously expressed applies to this evidentiary issue as well. *See* Memorandum Opinion (D.D.C. Jan. 24, 1983). As for the allegedly inflated number of DERs, it is questionable

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* Other restrictions relating to different concerns such as the avoidance of collateral issues will be discussed after defendant's challenge on the ground of relevance is considered.

The one year limitation should not be construed as a conclusion that all or most DERs filed over a year after birth are accusatory or self-serving. Rather, this limitation is designed to protect against defendant's concern, while assuring plaintiffs of an adequate set of DERs to select representative samples. Defendant's concern with the timeliness of the patient's reporting also should be alleviated by the one year limitation. It is true that as time passes, a patient's memory is likely to become less clear with respect to when Bendectin was taken and any other complications that may have caused the birth defects (although some of the DERs may contain prescription records and other details of the pregnancy). The Court rejects defendant's suggestion that DERs are so untimely, since they necessarily cannot be filed until after birth, that they should not qualify for a hearsay exception. The fact that the hearsay exception for statements of physical condition has been extended to past physician condition reflects that the exception tolerates some time lapse.

whether defendant can seriously dispute that the number of birth defects are significantly underreported. Hence, any inflation by the plaintiff's bar would appear to be offset by the propensity to underreport birth defects to defendant and the FDA. Lastly, defendant's concession that the DERs are a "red flag" and an "early warning device" for birth defects undercuts any contention that the DERs have no probative value. Whether defendant would be entitled to a directed verdict or a jury instruction if the only evidence of causation is the DERs is a separate issue to which the parties may devote their future attention.

Although defendant's arguments do not make the DERs irrelevant, they do raise a valid concern that no one should be permitted to suggest that the DERs are a random sample or are based upon any scientific methodology. To avoid confusing the jury and seriously distorting the nature of the DERs, plaintiffs will be barred from suggesting that any incidence rate of limb defects can be derived from the DERs. At most, plaintiffs will be permitted to indicate either the number of DERs involving Bendectin that concern birth defects or the number of DERs involving Bendectin that concern limb defects (depending on whether the permitted scope of the evidence is all birth defects or only limb defects).

The danger of collateral issues necessitates a final limitation on plaintiffs' use of the DERs. Plaintiffs will be permitted to discuss five DERs that they may select. This limitation to five representative samples will prevent the parties from digressing into a myriad of collateral issues concerning over five hundred DERs.

In sum, the DERs are admissible on the issues of notice and causation. Plaintiffs will be permitted to refer in detail to five representative samples which they may select from among those DERs filed less than one year after birth. Any accusatory language in the DERs also will be stricken. In addition, plaintiffs may elicit testimony concerning the number of DERs, but may not suggest an incidence rate for birth defects from the DERs or infer such a rate by citing the number of

DERs and the number of those DERs that refer to limb defects.

An Order consistent with this Memorandum Opinion will be entered this date.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

DATE: January 28, 1983

Order of the District Court Excluding DERs
Filed January 31, 1983

FILED—Jan 31 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

ORDER

Upon consideration of defendant's motion to exclude the drug experience reports (DERs) collected by the Food and Drug Administration, plaintiffs' opposition, the accompanying memoranda of law, the argument of counsel, and the entire record herein, it is this 28th day of January, 1983,

ORDERED that defendant's motion to exclude the DERs be, and hereby is, denied; and it is further

ORDERED that the following limitations shall be imposed on plaintiffs' use of the DERs:

1) Plaintiffs may elicit testimony concerning only five representative samples from among those DERs that were initiated less than one year after birth;

2) Plaintiffs may not refer to any language in the DERs containing accusations or allegations of fault involving defendant or the drug Bendectin;

3) Plaintiffs may not utilize the DERs to suggest any incidence rate of birth defects in general or limb defects in particular;

and it is further

ORDERED that plaintiffs shall notify defendant of the five DERs they have selected not later than five (5) days prior to the commencement of trial.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Excerpts from United States District Court for the District of Columbia Hearing Transcript of January 31, 1983

[9] MR. BRANTON: * * * *

I presume the trial is going to commence very shortly, although a specific date has not been set.

THE COURT: Well, a specific date has not been set and you know why. It has not been set because I haven't been able to set it. But I have told you that every day we come in here, if I can proceed to pretrial, I shall, and as soon as the pretrial is over, we begin trial. * * * *

[47] * * * * MR. BUTLER: We offered then and we offer now to refer the matter to the prosecutor here in Washington or to the prosecutor in California or the prosecutor in Florida, and to allow the FBI to take jurisdiction, because if there is a fraud on this Court, that's where it belongs. I do not believe it is the duty of this Court to give a badge to Mr. Walsh to become our prosecutor or our persecutor, and I think that it would be—

THE COURT: You are not suggesting that the Court **[48]** has, are you?

MR. BUTLER: I beg your pardon, Your Honor?

THE COURT: I said, you are not suggesting that the Court has, are you?

MR. BUTLER: Your Honor, you gave them an awful good opportunity on December 23rd when they communicated with the Court and nobody notified us of the communication to the Court and allowed them to start investigating our particular employee from the 23rd, the 24th and the 26th and thereafter.

THE COURT: Well, let me just say to you, Mr. Butler, that you are very much mistaken. The defendants did not communicate with me. I had nothing to do with anything that the defendants may have done prior to Christmas. I did learn that they talked to my clerk prior to Christmas, but they certainly did not talk to me.

I came to work as assigned on December 27th and received a letter from Mr. Lewis on that date. I don't know where you got your information from that this Court did anything with respect to anything that the defendants might have said or done prior to December 27th, and I did nothing with respect to it on December 27th save read the letter that they sent me. And on December 29th I received a letter from you, and from December 29th on, it has been one missive after another.

This Court took no action; no one requested this **[49]** Court to take action until sometimes the week of January 3rd when I was asked for an immediate deposition.

So, I don't know where you got that information from.

MR. BUTLER: I chose my words carefully. I said there was a communication with the Court, and I assume that a communication—

THE COURT: I am the Court.

MR. BUTLER: I think your functionaries are part of your court, Your Honor.

THE COURT: No, sir. I am the Court. I am the Court. My functionaries are not the Court and no one spoke to me prior to Christmas. * * * *

[59] * * * * MR. BUTLER: Your Honor, I really think that you ought to order the cessation of payments to that woman.

THE COURT: Well, that may be your view, and if you wish to, you may file an appropriate motion, because, as I said, I still haven't read that part of the deposition testimony where you say Mr. Schuck says that. But you certainly may file the appropriate motion.

MR. BUTLER: Your Honor, with respect to where we are going from this point, I have certain definite views. I would like to be heard on them. I don't know whether this is the time. * * * *

[61] * * * * MR. BUTLER: We would like to try to start in about three weeks, Your Honor.

THE COURT: No way, no way.

MR. BUTLER: I think that there are so many matters that—

THE COURT: I agree with you. There may be a lot of matters, but we will have to find a way to resolve those matters because I can't wait three weeks to go to trial. I have already lost a month. Well, maybe not a month. This would be the third week of trial but for these matters. Today would commence the third week of trial but for these matters.

So, that is something I will consider, but I doubt seriously if I can push it back three additional weeks. So, you start working towards moving it up, because I can't put **[62]** it off three additional weeks. * * * *

* * * * MR. WALSH: May it please the Court. I just have a few brief things to say.

First, I would like to make clear as to Mr. Lewis's telephone conversation prior to Christmas that all we were trying to find was the mechanics, whether the Court would be available for a conference with Mr. Eaton and us or whether I should—I think I was in Oklahoma City, as I remember, trying to decide what do I do. I've got telephone messages about Ms. Janowski. I don't want to—I was debating, do I have to talk with Mr. Eaton, bring it before Your Honor or can we find her and get a lawyer for her, because I didn't want my team exposed to her in a position that could cause some abortion in this case.

So, that's the only reason for his exploration.

THE COURT: Let me just ask Mr. Lewis something. Mr. Lewis, I would just ask you here on the record, based **[63]** upon that telephone call, were you given any direction by this Court?

MR. LEWIS: No direction whatsoever, Your Honor. I called to ask if the Court would be available for Mr. Eaton and myself prior to Christmas and was told that the Court would be in recess until the Monday following. No directions were given.

THE COURT: Thank you. Because as I said, I know I was on recess until I had to come in on Monday the 27th.

MR. BUTLER: Your Honor, could I inquire as to whether the substance of the problem was communicated to the clerk?

THE COURT: To my clerk? I have no idea what was communicated to my clerk.

MR. BUTLER: Could Mr. Lewis put it on the record, Your Honor?

THE COURT: As I told you a few minutes ago, it doesn't make any difference. If anybody chooses to say something to my clerk, that is their hard luck, because I have made it clear to him and I would think that members of the bar must know that a clerk doesn't make decisions, can't make decisions, can't offer direction.

MR. WALSH: I think Mr. Lewis recited it in his letter which went to Mr. Butler on Monday, Your Honor, as soon as we could.

[64] As I remember it, Your Honor was originally going to take the week after Christmas off.

THE COURT: Yes, I was, because I had originally been scheduled to work—the recess assignment list came out and I was scheduled to work on December 24th. It later occurred to the administrative office of this court that since Christmas was on a Saturday, then the 24th, that Friday, would be a government holiday. On holidays, a judge does not have to be present in the Court. You just have to be available, and they are different calendars. So, the 24th went to Judge Jackson.

The recess assignment calendar, however, came to me on Monday the 27th. So, I had to physically be present in the courthouse all day Monday the 27th. That was the only day in the entire holiday that I had to be in the courthouse.

MR. WALSH: And Mr. Butler very well knows that as soon as the weekend was over, he had a letter from Mr. Lewis summarizing the events of that period. • • • •

Defendant's Memorandum in Support of Motion for Imposition of Sanctions on Plaintiffs' Counsel Filed February 7, 1983

United States District Court
District of Columbia

Civil Division

Received—FEB 7 1983—U.S. District Court

(Caption Omitted in Printing)

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR IMPOSITION OF SANCTIONS ON PLAINTIFFS' COUNSEL, AND TO GIVE NOTICE OF DEFENDANT'S INTENTION TO MOVE TO STRIKE JURY DEMAND AND TO DISMISS COMPLAINT

• • • •

Nevertheless, the publication of information conveyed by Mr. Butler to the *Washington Post* will inevitably create unfair prejudice among some of the jury panel. Defendant has no recourse except to seek the dismissal of this action without prejudice to its reinstatement at some other time and upon a showing to this Court of good cause.

• • • •

(Certificate of Service Omitted in Printing)

Affidavit of Ogden N. Lewis In Support of Motion For An Order Imposing Sanctions on Plaintiffs' Counsel Filed February 7, 1983

United States District Court for the District of Columbia

(Caption Omitted in Printing)

AFFIDAVIT OF OGDEN N. LEWIS

Ogden N. Lewis, being duly sworn, deposes and says:

1.

• • • • I make this affidavit in support of defendant's motion for an order precluding the firm of Butler, Jefferson, Dan & Allis from appearing before this Court in this case.

2. Submitted herewith as Exhibit A is a set of 14 alleged Drug Experience Reports received by defendant on February 3, 1983, sent by James G. Butler, Esq., counsel for plaintiffs. I am informed by Mr. Alfred E. Schretter, resident counsel for defendant, that copies of Exhibit A have been given by Mr. Butler to *The Washington Post* and to the National Broadcasting Company and that defendant has received telephone inquiries from both. Mr. Schretter also informed me that Mr.

Butler sent copies of Exhibit A to the Commissioner of the Food and Drug Administration.

3. Attached hereto as Exhibit B is a copy of an article by Morton Mintz which appeared on page A3 of *The Washington Post* on February 7, 1983.

/s/ OGDEN N. LEWIS
Ogden N. Lewis

Sworn to before me this
7th day of February 1983.

/s/ LINDA D. HURLEY
Notary Public
My commission expires Aug. 14, 1984

(Certificate of Service Omitted in Printing)

Excerpt from Exhibit A to Affidavit of Ogden N. Lewis
Dated February 7, 1983

(3" x 5" Photograph Omitted)

Marco Cordova

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova Age 25 (at time of delivery)

Hospital Case Number 1-38346-9

Hospital (including address) Good Samaritan Hospital of Santa Clara Valley, 2425 Samaritan Drive, San Jose, California

Infant's Name(s) Marco Cordova
(If multiple birth, name of each)

Infant's Hospital Case Number(s) 1-38346-9
(If multiple birth, number of each)

Hospital (if in addition to above—including address) No

Hospital Case Number(s)
(If hospital in addition to above)

Physician Attending Delivery (if different from below) Dr. (?) Staff physician
Name (Printed)

Address

(City, State, and Zip)

Place of Delivery (including address) if Other Than Shown Above: Same as above

Physician Submitting This Report: N/A

(Signature)

Name (Printed)

Address

(City, State and Zip)

(Date of This Report)

RETURN TO:
MERRELL DOW PHARMACEUTICALS INC.
Subsidiary of the Dow Chemical Company
Cincinnati, Ohio 45215

FS FEB 02 1983

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Check 1 box in each of the following 4 columns. Attach available pediatric, pathologic, radiologic, or any consulting physicians' reports. If multiple birth, provide information on pages 1, 2, 3, & 4 of a separate copy of this form for each birth.

Single Birth XX Multiple Birth ☐ Number____ If multiple birth, name (or hospital number) of individual birth for these pages 1, 2, 3, & 4: _____	Living XX Stillbirth ☐ Neonatal Death I. ⟨ 1 Day ☐ II. 1-6 Days ☐ III. 7-28 Days ☐ Date of death: _____	Term (2500 g.* or more) XX Premature (1000-2499 g.*) ☐ Immature (500-999 g.*) ☐ Spontaneous Abortion (⟨ 500 g.*) ☐ Induced Abortion ☐	Birth Defects No ☐ Yes XX

Date and Time of Birth (or Delivery) 4/10/74

Total Length at Birth 42 cm.†

Crown-Rump Length at Birth / cm.†

Birth Weight 3004 g.*

Sex M Apgar Score ___/___ (at 1 min.)
___/___ (at 5 min.)

Perinatal † Death History (if checked)

Cause of perinatal death (if known) N/A

Spontaneous Abortion History (if checked)

Cause of spontaneous abortion (if known) and describe abortus if abnormal (*e.g.*, hydatidiform mole) N/A

Birth Defect History (if checked)

Delivering physician's clinical description of birth defect(s) At Birth (including age when first observed) Phocomelia: Upper and Lower extremities

(continued on next page)

*1 pound = 454 g.; 1 ounce = 28 g.
†1 inch = 2.54 cm.

± Perinatal death includes stillbirths and neonatal deaths

2500 g. = 5 pounds, 8 ounces
1000 g. = 2 pounds, 3½ ounces
499 g. = 1 pound, 2 ounces

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Birth Defect History (if checked)

Relationship or potential relationship, if any, of birth defect(s) to process of birth and explain (*e.g.*, long labor, difficult anesthesia, dystocia, anoxia, etc.).
None

Pediatrician's clinical description of birth defect(s)* (including age when first observed) Phocomelia: The clavicle and scapula appear intact but only 2 small bones are seen lateral to the R.F. shoulder. On the left side, no bony structures are apparent lateral to the shoulder.

Stanford University School of Med. Dept. of Radiology

The acetabulum is poorly formed and there is significant diastasis pubis. There is one long bone in each leg (probably femur).

Three apparent metacarpal bones are seen in each foot as well as several phalanges.

Pediatrician's name* N. Dunnick, Bruce Parker

Summary of radiology report (with dates)* 6/6/74

Summary of ophthalmology report (with dates)* None

Summary of neurology report (with dates)* _____
None

Summary of surgery report (with dates)* _____
None

Summary of pathology report (with dates)* _____
None

Summary of chromosome analysis report (with dates)*
N/A

(continued on next page)

*Attach available physician's reports and their names and addresses.

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Birth Defect History (if checked)

Summary of laboratory reports (with dates)* _____
None

Perinatal† complications (with dates or age) _____
None

Perinatal illnesses, infections, injuries, etc. (with dates or age) _____
None

History of all medication to child during perinatal period

Drug	Reason Used	Approx. Date(s) (inclusive)
	N/A	

Other pertinent perinatal history No

* Attach copies of available reports (routine blood, urine, chemistry, and special tests)

† Perinatal includes up to 27 days, 23 hours, and 59 minutes of life.

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Obstetric History

Details of delivery (if induced, give reason and method), anesthesia, other medication, episiotomy, abnormalities (including duration) of labor, birth (natural, breech, forceps, cesarean), and postpartum conditions
Uneventful, no forceps, spontaneous

If multiple pregnancy, specify if monovular or polyovular and explain
N/A

Comment on placenta and cord (placenta weight, umbilical vessels, pathology, etc.) 575 gms. and ~17 cms in diameter; Cord inserts slightly off center, but not at margin. Three prominent vessels, one congested with blood. No atypical features—Term Placenta.

If induced or therapeutic abortion, specify date, reason (*e.g.*, ectopic pregnancy), and describe abortus if abnormal (*e.g.*, hydatidiform mole)
N/A

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Antepartum History

Start of last menstrual period (date)	6-10-73	Estimated date of conception	6-(24-27)-73 or 7-18-73
Date of birth (or delivery)	4-10-74	Gestation (weeks after LMP)	43
Gestation (weeks after conception	41 38	Fetal age (weeks after conception)	41 38

Fetal position for last trimester Not stated

Maternal infections (including venereal) during this pregnancy (viral or bacterial with inclusion of clinical diagnosis, laboratory tests and results, dates, duration of infection and treatment, degree of fever, and duration of fever)
None

Other medical history during this pregnancy (illnesses, diabetes or other endocrine disorders, surgery, mental health—with dates) Ongoing rheumatoid arthritis

Routine blood, urine, and chemistry tests during this pregnancy? _____ If so, specify with dates and provide results (and date obtained) if abnormal*

N/A

Hemoglobinopathies (*e.g.*, sickle cell anemia)?

No

*Attach copy of reports if available

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Antepartum History (cont.)

Blood type and blood antigen/antibody tests *during* or *before* this pregnancy (*e.g.*, Rh factor, rubella, Australian, cytomegalovirus, herpes, etc.) No If so, give dates and results

Rh compatability with infant's father Compatible (+)

Special blood or urine hormone assay tests (*e.g.*, estriol) during this pregnancy? No If so, specify with results and dates

History of nausea and vomiting with severity, dates, and treatment

Nausea (None or Severity)	Nausea (Dates)	Vomiting (None or Severity)
Severe	8-1 to 8-30	Severe
Vomiting (Dates)	**Type of Treatment**	**Dates of Treatment**
once	Bendectin	8-1 to 8-30

History of inability or reduced ability to eat or retain food eaten? No If so, describe severity with dates and treatment with dates

---

History of alcoholic beverage consumption? No If so, type and amount consumed per day or week *during pregnancy* (each month or trimester of pregnancy if variable)

N/A

---

and before pregnancy N/A

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Antepartum History (cont.)

History of tobacco (or other) smoking? No If so, specify type and amount smoked per day or week *during pregnancy* (each month or trimester of pregnancy if variable)

and before pregnancy No

Vaginal bleeding during this pregnancy? No If so, state dates, amount or degree, cause, if known (*e.g.*, placental placement), and treatment

Attempted abortion by patient [date(s)]? No

If so, treatment N/A

Threatened abortion [date(s)]? No

If so, treatment N/A

Other complications of this pregnancy? No If so, describe with dates

History of all medication during this pregnancy [include all oral, parenteral (including vaccines), topical, vaccination, over-the-counter, investigational, and prescription drugs, including vitamins and hormones]

Drug	Reason Used	Approx. Date(s) (inclusive)
Aspirin	Arthritis	8-12 (5 grain tabs) daily thru 10/7
Bendectin	Nausea	8-1-73 thru 8-30-73
Prednisone	Arthritis	5 mgs daily thru 10/73

Amniocentesis, sonarography, etc.? No If so, identify with dates _____

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Antepartum History (cont.)

Exposure to radiation (including dental) during pregnancy (dose and date) No

Allergic reactions? No

If so, dates and treatment _____

Stress (emotional—deaths in family, family problems, etc., and dates) No

Toxemia of pregnancy? No

If so, treatment and dates _____

Weight change during this pregnancy 28 lb. (or ____ kg.)

Did an abnormal weight change occur during this pregnancy? No

If so, reason and treatment with dates _____

Anemia (diagnosis, laboratory result, dates) No

If so, treatment and dates N/A

Dental care (including anesthesia, operative) during this pregnancy? _____

If so, describe with dates _____

No

Exposure (with dates) to household chemicals or other potentially toxic substances in the home (cosmetic or hair preparations, *e.g.*, selenium), in the neighborhood (*e.g.*, insecticides, weed control or plant sprays), and at work

No

Occupation (if other than housewife) _____

Exposure (with dates) to pets (dogs, cats, hamsters, etc.) during pregnancy (with type of exposure, *e.g.*, pet in house, pet slept in bed with mother, etc.)

No

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PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Antepartum History (cont.)

Exposure (with dates and with whom, *e.g.*, other children in family) to communicable diseases (*e.g.*, rubella, varicella, etc.)

No

Travel (place, from-to, type of transportation, and dates) No

Seat belts (car, plane, type, dates) _____

No

Other history (including dates) of accidents or mechanical trauma (with inclusion of sports) during pregnancy

No

Pre-conceptual History

Was this a planned pregnancy? ☒ NO ☐ YES

Was a fertility drug used? ☒ NO ☐ YES If yes, specify drug(s), doses, dates of administration, and name and address of prescribing physician _____

Was artificial insemination involved? No

If so, amplify (*e.g.*, A.I.D., hetarologous or donor; A.I.H., homologous or husband; other; etc.) _____

Contraceptive (specify type, name, and date last used)
Norinvl up till January prior to pregnancy

Was oral contraceptive ever used? YES

If so, and different from above, specify name and date last used
Norinvl

Pre-conceptual body weight 128 lb. (or ____ kg.)

Body height 64 in. (or ____ cm.)

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Maternal History

Marital status ☒ Married ☐ Single ☐ Other

Race ☒ Caucasian ☐ Negro ☐ Oriental
☐ Am. Indian ☐ Spanish-Am.
☐ Other _____

Nationality (or nationalities) of family origin
(Example, ½ German, ¼ Irish, ¼ unknown)
¼ Italian; ¼ Austrian; ¼ Unknown

Age of menarche 14

Menstrual history prior to this pregnancy
Uneventful 28 days w/6 day flow.

Medical history prior to this pregnancy [infections (including veneral), illnesses, diabetes or other endocrine disorders, surgery, accidents, mental health—with dates] Rheumatoid Arthritis since 1977

History of all medication prior to this pregnancy (include all oral, parenteral, topical, over-the-counter, investigational, and prescription drugs, including vitamins and hormones) giving special attention to medication of the 2-year period prior to this pregnancy.

Drug	Reason Used	Approx. Date(s) (inclusive)
Aspirin		1972 to 10-73
Prednisone	Arthritis	1972 to 10-73

Radiation history prior to this pregnancy (including dental and other, as well as estimated exposure and date of diagnostic and therapeutic radiation)

Dental and arthritis diagnosis

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Maternal History (cont.)

History of previous pregnancies of mother. If other than normal term live birth, add comment (*e.g.*, reason, cause, etc., if possible, and provide summary description of birth defects if checked "yes")

PREGNANCY SEQUENCE	DATE OF DELIVERY	WEEKS OF GESTATION	(CHECK 1) SINGLE BIRTH	(CHECK 1) MULTIPLE BIRTH No.	LIVE BIRTH	STILL BIRTH	NEONATAL DEATH
1st	7/2/67	38	XX		XX		
COMMENT:							
2nd							
COMMENT:							
3rd							
COMMENT:							

(CHECK 1)		(CHECK 1)					(CHECK 1)	
SEX (ENTER NO.)		TERM	PRE-MATURE	IMMATURE	ABORTION (<500 G.)		BIRTH DEFECTS	
MALE	FEMALE	2500 G. OR MORE	1000 TO 2499 G.	500 TO 999 G.	INDUCED	SPONTAN.	NO	YES
XX		XX						XX
COMMENT:								
2nd								
COMMENT:								
3rd								
COMMENT:								

Complications (including bleeding episodes) of any of the above pregnancies or births (identify with above)

No

Maternal Family History of Diabetes

If family history of diabetes, give relationship of person(s) to mother

No

Maternal Genetic Counseling

If history of genetic counseling and/or chromosome analyses, provide summary*

No

* Attach copy of available report(s).

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Maternal Genetic History (if infant has birth defect)

Summary of family history of mother (her relatives such as brothers, sisters, parents, grandparents, uncles, aunts, their children, etc.) with regard to congenital birth defects, giving description, sex of person, relationship of person to the infant who is primary subject of this report

None

Paternal History

Father's Name Joseph R. Cordova

Age at time of delivery 37

Marital status ☒ Husband of mother ☐ Other

Race ☐ Caucasian ☐ Negro ☐ Oriental ☐ Am. Indian ☐ Spanish-Am. ☐ Other

Nationality (or nationalities) of family origin (Example, ½ German, ¼ Irish, ¼ unknown)

½ Italian—½ Polish

Comment on father's fertility status (sperm/semen quality, etc.)

Normal

Comment on Rh factor and compatability

(+) Compatible

Stress (emotional—job-related, deaths, family problems, etc. and dates) during wife's pregnancy or during 3 months prior to conception date.

No

Travel (place, from-to type of transportation, and dates, if different from that given in maternal history) during wife's pregnancy or during 3 months prior to conception date

No

Occupation Horse shoer

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PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Paternal History (Cont.)

Exposure (with dates and with whom if different from that given in maternal history) to communicable disease (*e.g.*, rubella, etc.) during wife's pregnancy or during 3 months prior to conception date

No

Exposure (with dates) to chemicals or other potentially toxic substances in the home, in the neighborhood, and at work during wife's pregnancy or during 3 months prior to conception date

No

Radiation history prior to the conception date of this pregnancy (including dental and other, as well as estimated exposure and date of diagnostic and therapeutic radiation)

No

Medical history prior to the conception date of this pregnancy [testicular problems, infections (including venereal), illnesses, diabetes or other endocrine disorders, surgery, accidents, mental health—with dates]

No

History of all medication prior to conception date of this pregnancy (include all oral, parenteral, topical, over-the-counter, investigational and prescription drugs, including vitamins and hormones) giving special attention to medication of the 2-year period prior to this pregnancy.

Drug	Reason Used	Approx. Date(s) inclusive
N/A		

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name Victoria Cordova

Paternal History (cont.)

Reproductive history of father related to known resulting pregnancies (those different from, or in addition to, those given in maternal history). If other than term live birth, add comment (*e.g.*, reason, cause, etc. if possible, and provide summary description of birth defects if checked "yes").

PREGNANCY SEQUENCE	DATE OF DELIVERY	WEEKS OF GESTATION	(CHECK 1) SINGLE BIRTH	(CHECK 1) MULTIPLE BIRTH No.	(CHECK 1) LIVE BIRTH	(CHECK 1) STILL BIRTH	(CHECK 1) NEONATAL DEATH
1st	3/2/60	38	XX		XX		
COMMENT:							
2nd							
COMMENT:							
3rd							
COMMENT:							

(CHECK 1)		(CHECK 1)					(CHECK 1)	
SEX (ENTER NO.)		TERM	PRE-MATURE	IMMATURE	ABORTION (<500 G.)		BIRTH DEFECTS	
MALE	FEMALE	2500 G. OR MORE	1000 TO 2499 G.	500 TO 999 G.	INDUCED	SPONTAN.	NO	YES
	XX	XX					XX	
COMMENT:								
2nd								
COMMENT:								
3rd								
COMMENT:								

Complications (including bleeding episodes) of any of the above pregnancies or births (identify with above)

None

Paternal Family History of Diabetes

If family history of diabetes, give relationship of person(s) to father

No

(continued on next page)

PHYSICIAN'S QUESTIONNAIRE

Outcome of Pregnancy

Do Not Write in This Space

Mother's Name: Victoria Cordova

Paternal Genetic Counseling

If history of genetic counseling and/or chromosome analyses, provide summary*

No

Paternal Genetic History (if infant has birth defect)

Specify, if any, known consanguinity of father and mother (cousins, second cousins, etc.)

No

Summary of family history of father (his relatives such as brothers, sisters, parents, grandparents, uncles, aunts, their children, etc.) with regard to congenital birth defects, giving description, sex of person, relationship of person to the infant who is primary subject of this report

None

*Attach copy of available report(s).

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BEST AVAILABLE COPY

Exhibit B to Affidavit of Ogden N. Lewis
Dated February 7, 1983

THE WASHINGTON POST Monday, February 7, 1983 A3

Lawsuits Allege Birth Defects in Children Whose Mothers Took Bendectin

By Morton Mintz
Washington Post Staff Writer

Lawsuits filed on behalf of seven children and their parents allege that the children were born without arms or legs or with other grave limb deformities because their mothers took Bendectin, the only government-approved drug for the "morning sickness" of early pregnancy.

Lawyers have been retained on behalf of seven more similarly deformed children and their parents.

The 14 cases of severe malformations open a new chapter in a continuing controversy about whether Bendectin taken in the first several weeks after conception has a cause-effect link to any of several birth defects, ranging from cleft palates to potentially fatal hernias.

The Food and Drug Administration is examining the cases but said late last week that no evidence to date establishes causal connections. The FDA's most relentless critic, the Public Citizen Health Research Group (HRG), and the manufacturer, Merrell Dow Pharmaceuticals Inc., took the same position.

"Because Bendectin is widely used in pregnancy [about 20 percent of pregnant women have used it in the past], many abnormalities will occur in babies exposed to the drug, whether or not the drug caused them," the FDA said.

The FDA also renewed advice that Bendectin "should be used only when more conservative treatment of nausea and vomiting has failed."

In Cincinnati, a Merrell Dow spokesman said that each of the 14 cases "must be looked at individually. There are variations from case to case, and no two are alike. Such things as the type of defect, when Bendectin was taken, other drugs that may have been ingested, and genetic factors are among those that must be examined .... We still contend that the drug is the most tested drug for pregnant women, and the accumulated human studies continue to show a lack of association between use of Bendectin and an increase in birth defects."

Similarly, the FDA said that "two dozen studies involving exposures to Bendectin during pregnancy have not shown a link between [it] and limb-reduction defects."

The chief plaintiffs' lawyer, James G. Butler of Los Angeles, pointed out that the human studies have been faulted by the FDA's own medical officers. He urged FDA Commissioner Arthur Hull Hayes Jr. to halt sales of Bendectin.

Butler also cited a two-month-old federally funded study indicating that women in early pregnancy who swallowed the original Bendectin tablets may have quadrupled the risk of pyloric stenosis, a birth defect of the stomach that restricts an infant's ability to eat.

Butler is a long-time legal adversary of the company, having won a $2.75 million jury award against it in 1972 for a legless child whose mother had taken thalidomide, a sedative/tranquilizer that caused thousands of such severe injuries worldwide in the 1960s. Thalidomide was "tested" but not sold here.

Over the last two years, Butler said in an interview, lawyers around the country who knew of his thalidomide victory referred most of the 14 cases. He said he intends to seek compensatory and punitive damages for all of the children.

In addition, the U.S. District Court in Cincinnati is conducting pretrial proceedings in about 150 Bendectin cases in which various diverse birth defects are alleged.

Last week, the parents of the 14 children—nine boys and five girls ranging in age from 3 to 20—released photos showing the deformities and statements about their cases to the FDA and to The Washington Post. At the time, Butler was preparing for trial of one of the lawsuits, which may begin this week in U.S. District Court here.

The plaintiff, Anne E. Koller, 3, has no arms, no right leg and a severely deformed left leg. She was born at Walter Reed Army Medical Center here but now lives in Broken Arrow, Okla.

The company, formerly a unit of Richardson-Merrell, Inc., contends that "Bendectin has been used safely in over 31 million pregnancies," that "there has been no proof of any increase in the incidence of birth defects associated with its use," and that "there is no evidence that it caused Anne Koller's birth defects." In addition, a company spokesman said "there is a serious question when Mrs. Koller may have taken Bendectin."

The 14 children include a girl who is missing major portions of all four limbs. Six are armless: Anne Koller; a boy with shortened thigh bones; a boy with a severely deformed left leg, and Tawana Herring, 19, of Washington.

Matthew DeMeritt, 13, of Inglewood, Calif., born without legs, played "E.T." in the drunk scene in the movie of the same name, Butler said. Pauline Sand, 7, of Fairfield, Calif., has stubs for arms and no right leg. The company spokesman said there is "no record" that Pauline's mother took the drug.

For 20 years after Bendectin went on sale in 1956, it contained a now-abandoned anti-spasm compound, a vitamin, and an antihistamine called doxylamine succinate. Abroad, the company continues to sell the three-part mixture as Debendox, Lenotan and Meribental.

Two 1981 animal studies, called "preliminary and unconfirmed" in the current official Bendectin labeling, are cited in court papers filed by Butler. One showed a possible link between doxylamine and a potentially fatal hernia in rats; another found a hole in the heart wall of seven fetuses of monkeys given the current version of the drug, which combines doxylamine with a vitamin.

Butler also has filed animal studies indicating that doxylamine as well as many other antihistamines and potent drugs, can damage the nerve which controls the development of an embryo's brain and spinal cord and can upset normal limb development. The studies go back to one published in 1950 by a famed University of California biologist.

"The damage increases with the size of the dose and can result in either injury or death to the nerve," Butler said. The evidence on doxylamine "points very strongly to the conclusion" that it causes birth defects in humans, he asserted.

The FDA rated Bendectin "effective" in 1976 after the anti-spasm compound was dropped, but has rated it "ineffective" at an earlier point. In 1981, HRG director Sidney M. Wolfe asked the government to halt sales of Bendectin on the ground that the vitamin ingredient decreases the effectiveness of the antihistamine. He also has charged that FDA files contain not a single study showing Bendectin to be effective as required by law.

Excerpt from United States District Court for the District of Columbia Hearing Transcript of February 7, 1983

• • • • Monday, February 7, 1983

The above-entitled matter came on for hearing before the Honorable NORMA HOLLOWAY JOHNSON, United States District Judge, at 10:20 a.m. • • • •

[2] • • • • THE COURT: Counsel, I received this morning a motion for disqualification of counsel for — some of the counsel for plaintiffs; is that correct? • • • •

[3] • • • • THE COURT: Now, I just received the motion this morning, Mr. Lewis, with respect to disqualification.

Mr. Eaton, when did you receive it?

MR. EATON: Your Honor, I have not seen it. I called my office from the courthouse this morning and I was told that it had been delivered. I don't know when it came in, ma'am.

THE COURT: Do you know whether it was delivered Friday or today? You just don't know?

MR. LEWIS: Your Honor, it would not have been delivered until this morning.

THE COURT: It was only this morning.

MR. LEWIS: The papers didn't leave our office until 9 o'clock. • • • •

Excerpt from United States District Court for the District of Columbia Hearing Transcript of February 9, 1983

[65] • • • • THE COURT: I'm going to permit the deposition of Mr. Ryan and Mr. Allis, and let's see if we can't get them done this weekend. • • • •

Excerpts from United States District Court for the District of Columbia Hearing Transcript of February 10, 1983

[76] • • • • THE COURT: "The birth defects sustained by Anne Koller resulted from exposure to the drug Bendectin ingested by her mother from on or about"—

MR. ALLIS: From near the beginning of the pregnancy and certainly before the 28th day up until the 40th day.

THE COURT: Why don't we say "from conception"?

MR. ALLIS: Okay.

THE COURT: From conception?

MR. ALLIS: Shortly after conception. That would be more accurate, because she didn't take it at conception. "Shortly after conception up through the 28th day."

THE COURT: Why don't we do it this way, "by her mother after conception or on or about the 28th day following conception to on or about the 40th day following conception"?

MR. ALLIS: That's fine.

THE COURT: Is that in essence what you contend?

MR. ALLIS: Yes. • • • •

[83] • • • • MR. WALSH: We believe that the birth defect of Anne Koller is an example of femur fibula ulna complex. Dr. Falk, who was **[84]** one of the examining physicians for the plaintiff, so diagnosed it. Dr. Valle, who was our examining physician, so diagnosed it.

If that is correct, the cause of this complex is unknown. Dr. Falk concedes that in her report and Dr. Valle would so testify.

It has not been associated with any drug or environmental factor. It has occurred many, many years ago, long before Bendectin, long before modern medicine. It occurs in various countries of the world where Bendectin is not sold.

There are alternate causes which cannot be ruled out by the plaintiffs' proof. • • • •

Plaintiffs' Response to Defendant's Motion for Sanctions Filed February 14, 1983

United States District Court for the District of Columbia

(Caption Omitted in Printing)

PLAINTIFFS' RESPONSE TO DEFENDANT'S AMENDED MEMORANDUM IN SUPPORT OF MOTION FOR IMPOSITION OF SANCTIONS ON PLAINTIFFS' COUNSEL AND TO GIVE NOTICE OF DEFENDANT'S INTENTION TO MOVE TO STRIKE JURY DEMAND AND TO DISMISS COMPLAINT

• • • • The remainder of the article focused on 14 cases which were recently filed as adverse reaction reports with the Food and Drug Administration. Copies were sent to Defendant so that Defendant would be prepared with knowledge of the events. The Commissioner of the Food and Drug Administration was notified by Mr. Butler as part of Mr. Butler's attempt to protect the health of unborn children by urging that the drug be taken off the market. See Exhibit D (Affidavit of James G. Butler) and Exhibit C (Letters to FDA and Defendant). • • • •

Dated: February 14, 1983

BUTLER, JEFFERSON, DAN & ALLIS
By: /s/ JAMES G. BUTLER
James G. Butler
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017
Telephone: (213) 627-6041

• • • •

(Certificate of Service Omitted in Printing)

Exhibit C to Plaintiffs' Response to Defendant's Motion for Sanctions Filed February 14, 1983

BUTLER, JEFFERSON, DAN & ALLIS
Attorneys and Counselors at Law
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017

(Letterhead Abbreviated in Printing)

January 28, 1983

Arthur Hull Hayes, Commissioner
Food and Drug Administration
5600 Fishers Lane
Rockville, Maryland 20852

Re: Bendectin

Dear Commissioner Hayes:

Because of the overwhelming importance of the enclosed documents, I am mailing them directly to you instead of the Medical Section of the Food and Drug Administration. These are Adverse Drug Reaction Reports on the drug Bendectin some 14 in number. Each of the cases represents a child who is horribly malformed and in each of the instances the mother took Bendectin during the sensitive period of organogenesis.

It appears to me that solely on a humanitarian basis, the time has now come for the Food and Drug Administration to do something to warn the public of the dangers of Bendectin. Here in the United States, bilateral malformations such as this are extremely rare, perhaps as rare as one in a million, and it seems to me that it is most unlikely that even with this number that Bendectin could not be the cause. The previous information supplied to you by Congressman Doug Walgren of Pennsylvania's 18th District and particularly the studies of Dr. Crescitelli and Dr. Stuart Newman which demonstrates the mechanism of action of doxylamine succinate, the problem

ingredient of Bendectin, seems to me to demand an immediate review by the Food and Drug Administration to take this noxious product off the market before it can do any more harm.

Your immedi[illegible]e attention to this serious matter is requested.

Very truly yours,

BUTLER, JEFFERSON, DAN & ALLIS

James G. Butler

JGB:fl
cc: Dr. C. Everett Koop, Surgeon General
Encls.

Exhibit C to Plaintiffs' Response to Defendant's Motion for Sanctions—Continued

BUTLER, JEFFERSON, DAN & ALLIS
Attorneys and Counselors at Law
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017

(Letterhead Abbreviated in Printing)

January 28, 1983

Merrell Dow Pharmaceutical Company
Medical Department
2110 East Galbraith Road
Cincinnati, Ohio 45215

Re: Bendectin

Gentlemen:

Enclosed herewith please find 14 of your questionnaires properly filled out reporting 14 additional cases of bilateral

limb malformations where the mother ingested your drug, Bendectin, during the sensitive period. It is requested that you immediately notify the Food and Drug Administration of these cases under the appropriate reporting provisions of the federal regulations. The names of the cases are as follows:

1. Gregory Wayne Buell
2. Marco Cordova
3. Matthew DeMeritt
4. Rose Herring-Jones
5. Anne Elizabeth Koller
6. Lauren Malone
7. Yasmin Rasheeda Murray
8. Patrick Norris
9. Steven Brantly Prescott
10. Pauline Victoria Sand
11. Brian A. Wilson
12. Shane Ross Wood
13. Kimberly Wykoff
14. Christopher John Yarger

Very truly yours,

BUTLER, JEFFERSON, DAN & ALLIS
/s/ JAMES G. BUTLER
James G. Butler

JGB:fl
Encls.

Exhibit D to Plaintiffs' Response to Defendant's Motion for Sanctions Filed February 14, 1983—Affidavit of James G. Butler

(Caption Omitted in Printing)

AFFIDAVIT OF JAMES G. BUTLER

• • • •

James G. Butler, being duly sworn, deposes and says:

1. I am a member of the law firm of Butler, Jefferson, Dan & Allis, attorneys of record for Plaintiffs herein.

2. That on or about January 28, 1983, I prepared the letter dated January 28, 1983 to Food and Drug Commissioner Hayes with a copy to Surgeon General Koop, a copy of which is attached hereto and marked as Exhibit C. Included with these letters were the 14 adverse drug reaction reports as reported on the drug Bendectin as reported on the questionnaire which were attached to Defendant's Motion and marked Exhibit "A".

3. I have examined all of the evidence concerning the drug Bendectin and discussed the matter with experts, and I am of the opinion that the evidence is overwhelming and that the drug undoubtedly is responsible for malformations in children, and that the sooner it is taken off the market, there will be less danger to the unborn. I have devoted the last two years of my life to an unceasing effort to see that this drug is removed from the market. In talking to the press, there was no motive other than to get the drug off the market. I sent the letter marked Exhibit C.

/s/ JAMES G. BUTLER
James G. Butler

Sworn to before me this
14th day of February, 1983

/s/ CHRISTINA L. OXLEY
Notary Public

Christina L. Oxley
Notary Public District of Columbia
My Commission Expires January 1, 1987

EXHIBIT D

Excerpts from United States District Court for the District of Columbia Hearing Transcript of February 17, 1983

[27] • • • • THE COURT: All right. Well, let me ask you this: If you feel or if you felt that the public needed to know about this, why didn't you tell the public about this shortly after I continued the trial last year? Why did you wait until I'm ready to select a jury this month?

MR. BRANTON: Well, for that matter, the trial—

THE COURT: I mean, Bendectin, in your view, was as dangerous in '82 as it was in '83, isn't it? So, why didn't you tell it in '82?

MR. BRANTON: Your Honor, there have been other articles.

THE COURT: My question is, why didn't Mr. Butler write the letter in '82? Why did he wait until January of '83?

MR. BRANTON: Your, Honor, I cannot answer—

THE COURT: Well, you are representing—

MR. BRANTON: —as to why he didn't do something in '82.

THE COURT: Excuse me. You are representing Mr. Butler. You are suggesting to me that because of the public interest in this drug—don't worry about your time, okay. Don't worry about your time. I have taken up some of your time. So, don't worry about it. I'll give you as much time as you need, and I will proceed to my next question or **[28]** continue my question now.

You are suggesting that because of the public interest in this drug, because of the great danger of this drug, the public needs to know.

My question is: Assuming that both of those propositions are true, why was it not done in 1982 when I continued the case until January '83? Why did you feel that it was only necessary to do it a few days before the month in which we would perhaps proceed to trial arrived?

MR. BRANTON: Your Honor, I do not know if there is an answer for that question. The fact of the matter was, it was done when it was done. Why it was not done at an earlier date, I honestly could not tell the Court. We believed back then—I

say we—plaintiffs' counsel believed back then that it caused birth defects, and I would say that if anything, as time has gone on and as discovery has continued and now been completed, and now as we are poised on the eve of trial, we feel even stronger than ever before that the drug does cause birth defects. • • • •

[41] • • • • MR. BRANTON: May I just have a moment to confer?

THE COURT: Yes.

MR. BRANTON: Thank you.

(Mr. Branton confers with Mr. Butler.)

THE COURT: Mr. Branton, you may proceed. • • • •

[44] THE COURT: Mr. Branton, before you leave, am I to understand that as far as you are concerned, you have presented all that you wish to present with respect to this motion, that is, you did not wish to present any witnesses or anything like that; am I to presume that that is correct?

MR. BRANTON: We do not wish to present anything further.

THE COURT: This is all you wish is this argument?

MR. BRANTON: Yes. Thank you, Your Honor.

• • • •

Letter of Carl J. Schuck to The Honorable Gerard D. Reilly Dated February 25, 1983

OVERTON, LYMAN & PRINCE
A Partnership Including Professional Corporations
Lawyers
550 South Flower Street—Fifth Floor
Los Angeles, California 90071
Telephone (213) 683-1100

(Letterhead Abbreviated in Printing)

February 25, 1983

Hon. Gerard D. Reilly
D. C. Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Re: Koller v. Richardson-Merrell

Dear Judge Reilly:

In response to the request made at the Krystyna Janowski deposition, the following are the amounts paid, or incurred, on behalf of the witness:

Security Apartment	$2,426.50
Cardiac/Apnea Monitor for witness' infant	382.00
Car Rental (est.)	1,286.00
Medical Insurance	1,507.20
Transportation Expense (mother) for baby care	258.00
	$5,859.70

Very truly yours,

/s/ CARL J. SCHUCK
Carl J. Schuck P.C.

CJS/pl

cc: All counsel

Excerpts from Deposition of Patrick Ryan Held February 26, 1983

Patrick Ryan, called as a witness by Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Butler

[91] • • • • Q. Did you mention to Krystyna Janowski that, with respect to counsel, that Richardson-Merrell or Davis, Polk would be responsible for any fees for any such counsel? A. I can't recall whether that was specifically mentioned or not, Mr. Butler. That was—I believe that was implied. • • • •

[107] • • • • A. I don't think so, but I—it's possible. It's possible that I said to her, "I'm going to talk to your lawyer." It seems like I may have said to her, "I'm going to talk to your lawyer about putting you up someplace till this **[108]** matter can be resolved because I'm concerned about your safety." I may have said that, and it does seem to me like I did say something to that effect to her. • • • •

[199] • • • • Q. Did she say anything about "How about you guys bribing me" or "How about a bribe?" A. She did make the comment, something to the effect, "How about you guys bribing me" yes, sir.

Q. Did she say that to you? A. Yes, sir.

Q. And did she say "How about a bribe"?

[200] • • • • A. She said, "How about you guys bribing me?"

Q. What— A. Or something to that effect.

Q. What did you do when she said that? A. She was laughing when she said it. I interpreted it as a remark made in jest and I did not say anything to her when she said that. • • • •

Cross Examination by Mr. Cohen

[262] • • • • Q. Did you or any representatives of Davis, Polk, Crowe & Dunleavy, or your firm, Mr. Ryan, ever offer Krystyna Janowski $15,000? A. No, sir.

Q. Did you understand the December 28th letter that Mr. Butler wrote to the court mentioning the $15,000 to imply that it was your side, the representatives of the defendant that were doing the offering? A. That's how I understood the letter.

Q. Had there been any need for you to have Mr. Barnes investigate the allegation or could you have found out about that allegation simply by asking your colleagues? A. I understood there was no truth to it. There was nothing to investigate. * * * *

Plaintiffs' Submission in Support of Objection to Evidentiary Hearing on Fraud on the Court Filed March 2, 1983

United States District Court
For the District of Columbia

(Caption Omitted in Printing)

SUBMISSION BY PLAINTIFFS IN SUPPORT OF OBJECTION TO EVIDENTIARY HEARING ON FRAUD ON THE COURT

Plaintiffs hereby submit the attached documents and papers relating to the issue of fraud on the court. * * * *

Dated: March 2, 1983

Respectfully submitted,

BUTLER, JEFFERSON, DAN & ALLIS

By: /s/ JAMES G. BUTLER
James G. Butler
626 Wilshire Boulevard
Suite 914
Los Angeles, California 90017
Telephone: (213) 627-6041

* * * *

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Excerpts from Exhibit 2 Annexed to Plaintiffs' Submission in Support of Objection to Evidentiary Hearing on Fraud on the Court—Selected Medical Records of Mrs. Cynthia Koller

INITIAL PREGNANCY PROFILE — MOTHER'S PHYSICIAN COPY

	Check	Check and detail all positive findings below. Precede findings with symptom number.
1. Headaches		
2. Nausea/vomiting	✓	NAUSEA & VOMITING ALL DAY – ESP. IN EVE.
3. Abdominal pain	✓	SOME CRAMPING ESP. IF BEING ON FEET
4. Urinary complaints		
5. Vaginal discharge		
6. Vaginal bleeding		
7. Edema (specify area)		
8. Febrile episode		
9. Rubella exposure		
10. Other viral exposure		
11. Drug exposure		
12. Radiation exposure		
13. Other		

14. Last contraceptive ☐ None
Type _____
Last used _____

15. Nutritional Assessment
☐ Adequate ☐ Inadequate
Remarks: _____

16. Medications Since LMP
(Rx, non-Rx, vitamins) ☐ None
Describe: _____

Initial Physical Examination — Height | Weight 116 | Pregravid weight | B.P. 160/70 | Pulse | OPTIONAL

SYSTEM	Normal	Abn.	Check and detail all positive findings below. Use system numbers.
17. Skin			
18. EENT			
19. Mouth			
20. Neck			
21. Chest			
22. Breast			
23. Heart			
24. Lungs			
25. Abdomen			
26. Musculoskeletal			
27. Extremities			
28. Neurologic			
Pelvic Examination			
29. Ext. genitalia			
30. Vagina			
31. Cervix			
32. Uterus (describe)			12-14 wks
33. Adnexa			
34. Rectum			
35. Other			

Sony Pelvis	36 Diag. conj. 7 1/2	37 Shape sacrum MD	38 S.S. notch 7	39 Ischial spines BC	44
	40 Pubic arch 90	41 Trans. outlet AD	42 Post. sag. diam AD	43 Coccyx FLEXES	45

48. Classification: ☑ Gynecoid ☐ Android ☐ Anthropoid ☐ Platypelloid
47. Estimation: ☑ Adequate ☐ Borderline ☐ Contracted

Exam by _____

HOLLISTER maternal/newborn RECORD SYSTEM

Initial Pregnancy Profile Date

BEST AVAILABLE COPY

HOLLISTER™ *Trademarks of Hollister Incorporated

HOLLISTER INCORPORATED, 211 E. CHICAGO AVE., CHICAGO, ILL. 60611

PRENATAL FLOW RECORD

MATERNAL RECORD COPY

Risk Guide for Pregnancy and Outcome

Preliminary Risk Assessment (detail risk factors from the HHS below)

☐ (0) No risk factors noted
☐ (1) At risk
☐ (2) High risk

(F) F.H.D.M. - SCREEN
Hx DIGMAT. LGA @ 34 wks

Continuing Risk Guide (enter dates first noted and revise RISK STATUS)

Mo/day	Potential risk factors	Mo/day	High risk factors
/	3. Preg. without familial support	/	18. Diabetes mellitus
/	4. Second pregnancy in 12 months	/	19. Hypertension
/	5. Smoking (≥ 1 pack per day)	/	20. Thrombophlebitis
/	6. Rh negative (nonsensitized)	/	21. Herpes (type 2)
/	7. Uterine/cervical malformation	/	22. Rh sensitization
/	8. Inadequate pelvis	/	23. Uterine bleeding
/	9. Venereal disease	/	24. Hydramnios
/	10. Anemia (Hct < 30%; Hgb < 10%)	/	25. Severe preeclampsia
/	11. Acute pyelonephritis	/	26. Fetal growth retardation
/	12. Failure to gain weight	/	27. Premature rupt. membranes
/	13. Multiple pregnancy (term)	/	28. Multiple pregnancy (preterm)
/	14. Abnormal presentation	/	29. Low/falling estriols
/	15. Postterm pregnancy	/	30. Significant social problems
/	16.	/	31.
/	17.	/	32.

Flow Chart — Year / Pre-gravid; Date; Weight this visit; Blood pressure; Protein; Sugar; Est. weeks gestation (dates/size); Fundal height; Fetal heart rate; Edema; Urine; Initials of MD/CNM/RN; Patient's Age — 24

Initial Prenatal Screen			Additional Lab Findings		
Mo/day	Test	Result	Mo/day	Test	Result
10/25	Hct/Hgb	41.5	4/12	Hct/Hgb	35.7
/	Patient's Blood type and Rh	O+	/	Hct/Hgb	
/	Father's Blood type and Rh		/		
10/25	Antibody	O	/		
10/25	Serology	NR	/		
NR	Rubella titer	41:8	/		
/	Urinalysis micro		/		
/	Pap. test		/		
/	G.C.		/		

G	T	P	A	L	VCU	DOM	DOD
2		1		1	30 mo/day/yr 8/6/78		5/5/79

☒ Attends prenatal classes
☐ Cesarean section
☐ For sterilization
☒ Breast ☐ Bottle feeding
☒ Circumcision

Anesthesia

Baby's physician

11/20	116	110/70			12	12.14	O+			RTC 4 wks / as is BEDREST.
12/	115	/			/					HOLD NURSE WILL 2 → WILL PUSH TO GROUP PRACT.
12/18	118	110/70	N	N	16	17	NH	—		RTC 4 wks IF NOT PREGNANT SWD
12/19		/			17	U-3	+ protein			FHT's Doppler NH: Dalkon RTC 4 wks with 1 for FHTs: Dalkon
1/5	121	100/60	N	N	18	19	+ Doppler			ALL OK RTC 4 wks
1/12	119½	104/42	N	N	22	21+	+ O			Dopp CWD RTC 2 wks
3/2	123	100/60	N	N	29	27+	+ O			Dopp CWD Rhonchi Thin Outlined. 75
3/30	125	100/60	ϕ	ϕ	30+	31	ok	O		daily wdl. RTC 2 wks. - dopplers SCH
4/2	126	112/78	N	N	31	32	ok			Report BP 108/70 Felt dizzy this morn - now better. Ex lungs clear.
4/13	124	90/60	N	N	32+	33	ok	O	V+ FHT	Plan - 1) Bedrest today. 2) RTC 2 wks. SCH
/	/	/			/					
4/27	125	90/60	ϕ	ϕ	34	35	ok	O	V+ FHT	Ex lungs clear. RTC 2 wks SCH
5/11	123½	110/70	T	N	36+	34	ok	O	V+ FHT	Ex lungs, part, FT. RTC 2 wks. SCH.

Physician's signature

20 45704 27 07
ASO OPUD
KOLLER CYNTHIA
195 F AD USA
FLT

HOLLISTER maternal/newborn RECORD SYSTEM

Prenatal Flow Record

146

147

BEST AVAILABLE COPY

9 Jun '79

Pt. delivered a viable [female] Apagar 8/9, wt. 6-3½ c̄ multiple limb reduction defects—specifically completely absent R arm, a small 1/2 cm sub gravis from R hip c̄ no R leg, a flipper-like L arm s hand or fingers, and a deformed L leg c 4 toes. She also has a low set R ear.

Review of chart shows that the pt took Actifed and Afrin nose drops at approx 26 wk gestation. She also took prenatal vit. and Fe and Bendectin, but no other meds. Her family rx is . . . for D . . . and there is some "mild mental retardation" on her husband's side of the family. The only other significant rx is that her rubella titer was ⟨1:2 in Oct, repeat in Dec. was also ⟨1:8 (reflects no exposure to virus). No other known exposure to teratogenic substances or radiation.

Will discuss c̄ Staff & Peds *re* further evaluation.

S.Q.

Excerpts from Exhibit 3 Annexed to Plaintiffs' Submission in Support of Objection to Evidentiary Hearing on Fraud on the Court—Selected Medical Records of Anne Koller

CLINICAL RECORD HISTORY—Part I

NATURE AND DURATION OF COMPLAINTS (Include circumstances of admission)

Congenital Abnormalities
Terminal Mec Staining

HISTORY OF PRESENT ILLNESSES

This 6 lbs-3½ oz. Newborn [female] was delivered vaginally at 0435 hrs. spontaneously from a 25 y.o. G_2 Para 1-0-0-1 0+ Seral(-) White [female]. 1,5 min apgars were 8, 9. Terminal meconium staining present and meconium stained gastric aspirate returned *after* DeLee suctioning. Infants respirations spontaneous, color pink. Taken to intermediate nursery for observation because of the above and because of malformed/absent extremities

Mom is a G_2 Para 1-0-0-1 0+ Seral(-) active duty (CPT) Army Nurse who workes on Wd 52, WRAMC. Contractions began 8 June—2030 hrs, spontan, Born—0315 hrs—9 June. She states that this pregnancy was uncomplicated except for 1st trimester nausea (took Bendectin) and late 3rd trimester URI—lasted 24 hrs (took Afrin nosedrops & Actifed).

O: Bones felt in all extremities; mother admits only to Bendectin Afrin and Actifed ingestion; no other exogenous drugs taken.
A: otherwise grossly child WNC same
P: further studies to follow

Collins

CLINICAL RECORD NARRATIVE SUMMARY

Date of Admission	Date of Discharge
9 JUNE 79	13 JUNE 79

CHIEF COMPLAINT: Congenital abnormalities and terminal meconium staining.

HISTORY OF PRESENT ILLNESS: This 6 lbs., 3 1/2 oz. newborn female was delivered vaginally at 0435 hours on 9 June 1979 spontaneously. The mother is a 25-year-old, gravida 2, para 1, 0 positive, serology negative, white female. Apgars were noted to be 8 and 9 at 1 and 5 minutes, respectively. Terminal meconium staining was present, and meconium stained gastric aspirate was noted after DeLee suctioning. The infant's respirations were spontaneous; the color was pink, and she was taken to an intermediate nursery for observation because of the above and because of malforming or absent extremities. The pregnancy was complicated only by first trimester nausea treated with Bendectin and late third trimester upper respiratory infection which lasted for 24 hours, treated with Afrin nose drops and Actifed. The patient also took iron and vitamin pills during the pregnancy. She denies any other drugs or medical use. The patient denies smoking, alcohol intake except for a glass of wine approximately a week ago. The mother does have a Penicillin allergy, and the last Rubella titer in December of 78 was 1:8. Previous child was born at approximately 34 weeks gestation and weighed 6 lbs., 7 oz. and had minor respiratory distress syndrome and jaundice. The child was also treated for viral meningitis at four months of age. Otherwise, the child is healthy. The first pregnancy was complicated only by post partum hemorrhage which was treated with blood transfusions. The placenta was examined at the time of delivery and found to have several infarcted areas; otherwise unremarkable.

PAST HISTORY & FAMILY HISTORY: The history is pertinent only for diabetes in a grandmother. No history of congenital abnormalities in the family. The father does have mild asthma. There is a positive history of mental retardation in the family and several instances of club foot in the family.

SYSTEM REVIEW: The review of systems is noncontributory.

PHYSICAL EXAMINATION: In general, the height was 34.5 cm., head 35 cm., weight, 2,820 gm., temperature 98 axillary and pulse 150.

TWO WEEK WELL BABY CLINIC

Record answers to the following questions *(in weeks gestation as appropriate).*
Comment in the REMARKS section as needed.

PRENANTAL HISTORY:

1. Mother's age 25
2. G 2 P 2 AB ___ TAB ___ Other ___
3. Prenatal care began 2 wks gestation
4. Weight gain ~20 #
5. Medications taken: Bendectin Actified
   a. Vitamins with Iron ✓
   b. Prescribed medications —
   c. Over the counter drugs As above
6. Amount per day:
   a. Alcohol use —
   b. Cigarettes —
7. Illness Morning sickness
   a. Acute —
   b. Chronic —
8. Pre-eclampsia, treatment —
9. Vaginal bleeding —
10. Medical interventions —
11. Surgical interventions —
12. Special tests, GTT, OCT, Other ___
13. Planned pregnancy Yes

LABOR AND DELIVERY:

14. Length of pregnancy 9 months
15. Spontaneous/~~induced~~ labor ___
16. Vaginal delivery *(instruments)* N/A
17. Cesarean section *(reason)* —
18. Postpartum complications —

NEONATAL HISTORY:

19. Apgar 8/9
20. Birth weight 6-3 Length 34.5 cm Head circumference 35 cm Chest Circumference 35
21. Bilirubin problems —
22. Infection —
23. Feeding difficulties —

REMARKS: (Identify by question number) Congenital • • •

Excerpts from Exhibit 4 Annexed to Plaintiffs' Submission in Support of Objection to Evidentiary Hearing on Fraud on the Court—Selected Personnel Records of Mrs. Cynthia Koller

• • •

• • •

CPT Koller's performance of duty has been consistently outstanding during this rated period. She is an astute and sensitive nurse and has demonstrated her ability and effectiveness by planning, organizing and directing total patient care for all patients on this neurology ward. Her perception, insight and excellent judgment were well utilized in planning care for the chronically ill from admission to discharge. CPT Koller is a dedicated, loyal and enthusiastic nurse who shows great potential within the ANC. Her personal integrity and professional competence have brought credit to herself and the nursing profession.

• • • CPT Koller has performed her duties as SCN in an outstanding manner. Her nursing expertise and commitment to her profession is well recognized by all associated with this hard working officer. She is effective with staff, promoting

their growth in an atmosphere conducive to self direction. This young officer has progressed from staff nurse to SCN demonstrating rapid development as a clinical nurse and responsible officer. CPT Koller is a mature, self reliant professional who has contributed most generously of self to this difficult unit. I wish to express my appreciation for the outstanding manner in which she has served WRAMC and the Army Nurse Corps.

• • •

Excerpts from United States District Court for the District of Columbia Hearing Transcript of March 2, 1983

[15] • • • • THE COURT: I'm not as concerned with the issue of whether she heard Mrs. Koller say that she did or did not take Bendectin. I'm concerned with Mr. Allis's preparation of a statement and taking a statement to her for her signature. That's what I'm concerned with right now. That's what I told **[16]** you I would like you to address. • • • •

[18] • • • • THE COURT: What troubles me about Mr. Allis's testimony is his preparation of and taking to Ms. Janowski that statement that she signed and that you sent to me on the 29th or the 28th or whatever. I think I received it on the **[19]** 29th. I'm concerned about that statement. It appears that it was something that he prepared and took to her for her signature. In reading the transcript of the tape recording that Mr. Humphries made, there was something kind of unusual about Ms. Janowski saying, "Oh, you know, like, if you have a statement, why don't you pull it out of your pocket."

The circumstances, the statement itself, these are the things that concern me, and I would like you to address them as best you can, because I am concerned about them. Give me any other circumstances or anything else that you think I need to know about this before I make a decision on it. • • • •

[28] • • • • THE COURT: I will say to you gentlemen that since the completion of Ms. Janowski's deposition, and even really before I completed reading the full deposition, I was of the view that actually what I have here primarily is a conflict in

testimony. I wondered if I had any more than just a simple conflict in testimony as far as the merits of the case is concerned, all right. As far as the merits of the case is concerned, I wondered if this isn't any more than just a conflict in testimony and if the best way to handle this would be to proceed with the trial and leave it up to the defendant as to whether or not the defendant wished to place Ms. Janowski on the witness stand and vouch for her credibility.

But before I made that decision, I decided that maybe I needed to know just one other thing, and that is, I **[29]** wanted to know a bit more about the plaintiffs' allegations against the defendant as it related to the bribe. So, that's why I ordered Mr. Ryan to undergo a deposition, after having the Barneses and a few others undergo depositions. I wanted to know what Mr. Allis's role was with respect to that statement that was signed on the 27th of December, and that is why I asked him one day if he still opposed being deposed, and he told me he still opposed being deposed, but I ordered his deposition as well.

So, as far as I could then see or foresee, the results of this motion, everything should have been, I felt, in and complete by the time I reviewed the testimony of Mr. Ryan and Mr. Allis.

Unfortunately, I am not yet satisfied. I am not yet satisfied. I am not yet satisfied that I can proceed to the trial in this case even if I am able to call Ms. Janowski as my witness. I'm not convinced that I am as yet ready, and my concern is not so much the testimony of Ms. Janowski, which can be totally disregarded by the jury. As far as the merits of Mrs. Koller's case are concerned, Ms. Janowski's testimony can be totally disregarded by the jury. Only the jury can make a determination whether she's telling the truth or not, or whether they want to believe her or not, or whether they want to believe anything, any of what she has to say. So, it may be just totally disregarded by the jury.

[30] But I am very concerned about what counsel did with respect to Ms. Janowski once it became clear that she had started talking, and excuse the vernacular, out of school. That's my major concern, and I think I'm going to have to just take a couple of more depositions before I am able to make a final decision on that. • • • •

Excerpts from United States District Court for the District of Columbia Hearing Transcript of March 7, 1983, 10:00 a.m. Session

[9] • • • • THE COURT: • • • •

As you know, since January, I guess since January 3rd, the day when I ordered that a deposition be taken of Ms. Janowski—it may have been January 6th; I'm not sure—but since the first seven days of January, I have been very concerned about an issue which had been an absolute non-issue prior to that time, and that is whether or not some fraud has been committed upon the court. It has taken an awful lot of my time and attention. It has taken an awful lot of time and attention from both sides in this case. In fact, as you well know, we have had to spend a great deal of time in depositions and in pleadings relating solely to whether or not there has been a fraud committed upon this court.

Initially, it would appear to me, that the first concern was with the statements of Ms. Janowski, her statements to us through the deposition conducted in California. But I have since become very concerned about another issue, also an issue relating to fraud, and that relates to the statement of Ms. Janowski filed with this Court in late **[10]** December, the statement that was prepared by Mr. Allis and signed by Ms. Janowski.

I have so many serious concerns about that statement that I have concluded that the only way to resolve the problems that I foresee with respect to that statement is to conduct an evidentiary hearing on that aspect of it.

Now, I am not ordering a full scale evidentiary hearing as requested by the defendant touching upon all of the allegations made by Ms. Janowski, but rather, a limited evidentiary hearing as it relates to that statement prepared by Mr. Allis, signed by Ms. Janowski, and presented to me by letter dated December 28th and received by me on December 29th.

I had indicated my concerns last week to you gentlemen and that's why I ordered the deposition of Mr. Daum, since some evidence tended to show that Mr. Daum was the very first

person in the Butler firm to speak with Ms. Janowski after December 25th.

I cannot unravel this without a full evidentiary hearing. I just cannot unravel it without a full evidentiary hearing. I have reviewed Mr. Daum's testimony. I have gone back to Mr. Allis's testimony, and I cannot unravel it, and until I can unravel it, we are going to have a pall over this case, and I do believe that before we can begin the first word of evidence in this trial, I must unravel this puzzle as **[11]** to whether or not that conduct in any way reflects any type of fraudulent conduct on the court. There's just no way to go forward until I unravel that puzzle. It's just a puzzle to me.

The testimony so far has not been clear enough for me to make any type of determination, and thus an evidentiary hearing is going to be required. * * * *

[19] * * * * THE COURT: Very definitely, this matter is very limited.

Mr. Stein, I did get the impression from you during your comments that you were of the view that I am getting involved in all of these allegations that have been made against the plaintiffs. I really am not.

I am just concerned about something that Mr. Allis and Mr. Butler turned in to me, namely, that statement that Mr. Allis prepared, according to his deposition, and took to Ms. Janowski on the night of the 27th and had her sign. That is what is of concern to me.

As far as I am concerned, I don't even think Ms. Janowski needs to be here, because I am not focusing on Ms. Janowski now. I am focusing on Mr. Allis. That's who I am focusing on.

I want you to understand that surely you know that I know that I cannot proceed criminally in this case. I have no right to bring criminal charges, but I certainly think that in any civil case in which I am involved and in which an issue has come up, and I think a serious issue, but I can't **[20]** determine how serious it is just based on the depositions—I was hoping that I could, and that's why I ordered Mr. Daum to be deposed. I was hoping that hearing from him and whatever he knew about this might cause me to be in a position to untangle some problems.

I think I mentioned last week that some of my concerns I'm unable to articulate, because maybe enough questions weren't asked for me to untangle it, or maybe there was an area in the depositions that I thought should have been gone into a bit more, or maybe I thought maybe Mr. Allis wasn't responsive enough. So, I said, okay, give him the benefit of the doubt; let me hear what Mr. Daum has to say. So I spent Friday reading Mr. Daum's testimony and going back over Mr. Allis's testimony, and there is still some area that I'm not sure of and I want to have an evidentiary hearing.

Now, that evidentiary hearing is not designed to take the place of any hearing or investigation that our grievance committee might choose to do and perhaps will be asked to do. That has nothing to do with any criminal charges. I certainly have no right and know I have no right to determine whether any criminal charges shall be filed. That's not my role.

My role here, I believe—and I want you to know it is a troubling role. This case has indeed become troubling since I learned about Krystyna Janowski. It has **[21]** become troubling. But on the other hand, I believe that the Court has to be balanced. It has to be balanced. And the Court has to know how this statement of December 27th came about, and the best way for me to determine that, I think, is through an evidentiary hearing.

I am not at all concerned in this hearing with whether Ms. Janowski ever talked with Mrs. Koller or not, whether Mrs. Koller ever told Ms. Janowski she never took Bendectin—that's not of any concern to me—whether any Walter Reed records were destroyed by Cohen & Kokus or, if not destroyed, somehow caused to disappear. I'm not concerned with whether or not Mr. Henke said stonewall it. I'm not concerned about any of those things.

I am just concerned right now with what were the circumstances surrounding that letter. It's not really a letter. It's a statement, that statement signed by Ms. Janowski. I know it was signed by her, based upon the transcript of the tape recording. * * * *

[24] MR. STEIN: It would be of great value. It would be of great value to know the precise area.

As I understand it—these are just observations, Your Honor—it is not the credibility of Ms. Janowski that is of interest to the Court at this time.

THE COURT: Not really.

MR. STEIN: It's the events which led up to the presentation of the statement and what is in the statement.

THE COURT: Yes. That's my primary concern.

MR. STEIN: Thank you, Your Honor. * * * *

Excerpts from United States District Court for the District of Columbia Transcript of March 7, 1983, 3:30 p.m.
Telephone Conference Call

[5] * * * * THE COURT: Well, let me say this to you, Mr. Stein. I am not really and truly moving forward on that Davis Polk memorandum, but I did ask you if you read that memorandum because of all of the memoranda that I have received from Davis Polk touching upon the issue of fraud on the Court, and this goes back from sometimes in January, and then also I think in late February Davis Polk filed a memorandum concerning dismissal of the case or waiver of jury demand. I am not moving on that either.

[6] In fact, I am not moving on any motion made by Davis Polk, but I am moving on an issue that they also addressed in some respect in that March 2nd memorandum, but I am not moving on that memorandum. That is not the basis for this hearing.

MR. STEIN: Okay. That's very helpful to me—

THE COURT: Okay.

MR. STEIN: —in putting this in a way that I can analyze it.

THE COURT: This is really on my own motion. I admit that after reading Mr. Allis's deposition, believing that maybe this could be resolved if I heard from Mr. Daum, but then having read Mr. Daum's testimony on Friday, I still have questions in

my mind as to what was the purpose of that statement. I feel that the only way I can determine whether or not that statement had as its purpose—not necessarily its sole purpose—but had as its purpose an affront to the integrity of this Court, that has to be ruled on before I can move into the trial of this case.

So, I'm saying in essence that the hearing that I have scheduled is somewhat related to what Davis Polk has been able to perceive about that statement of Krystyna Janowski's, but I think it may involve just a bit more than that, and the relief requested in that, I have never—in fact, I'm not even sure what relief they requested. But I do **[7]** know this: I'm not proceeding on that hearing based upon their requested relief. * * * *

[9] * * * * MR. COHEN: We don't think Janowski's credibility is at all in issue. It seems to me, if one member of the firm or one party on his side states under oath that a certain thing happened and was done and Mr. Allis states that a different thing happened and was done, I don't think Ms. Janowski has anything to do with that.

So, all I'm saying is that it seems to me the focus of that is Allis per se, and perhaps Butler, whom we haven't deposed, because Mr. Daum made it clear that everything that happened on the 27th was done with the approval of Mr. Butler. I just don't see what Janowski would add to this.

[10] * * * * THE COURT: Well, Mr. Stein and Mr. Cohen, let me say this. It appears to me, and I could be wrong and it could later develop that I'm wrong, that on this limited issue that concerns me, whether Krystyna Janowski is, as she is so affectionately called by Mr. Butler, a "pathological liar" or not, is not at issue. Whether her credibility is at issue or not and whether the statement she prepared is true or false just to me does not appear to be the issue that I am trying to resolve, and, as I said, if I have been less than **[11]** able to frame it in a way that is totally understandable to everyone, it's because I am so inundated with facts, facts, facts, and unfacts, and nonfacts as a result of this case that the fact that I still know there is such a case is a maricle [sic]. But I really am doing my best to frame for you what concerns me, and that is, whether this firm, particularly Mr. Allis, attempted through the use of this statement to assault or affront the—assault is really the

better word—assault the integrity of this Court.

I do see possible conflicts. You see, I've never seen Humphries. I've never seen—well, I have seen Mr. Daum in the courtroom, but I don't know just what is what. But having read most of the depositions that were taken since the Janowski deposition, which commenced sometimes in January, I have that question in my mind, and I just believe that the only way to resolve it is to let those people who can resolve it just testify.

As I said, this is no criminal proceeding. This is just a proceeding to determine whether or not Mr. Allis or anybody else in that firm has tried to take unfair advantage of this Court's integrity through presenting that particular statement to me on December 29th. That's what I'm trying to determine. • • • •

Order of the District Court Setting Evidentiary Hearing Filed March 8, 1983

FILED—Mar 8 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,
Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,
Defendant.

ORDER

WHEREAS this action was commenced in May 1980 and has been the subject of extensive pretrial discovery, and was set down for trial commencing March 3, 1982; and

WHEREAS by order of the Court entered February 17, 1982, said trial date was adjourned until January 10, 1983, and subsequently adjourned further to January 17, 1983, and

WHEREAS both plaintiffs and defendant have communicated with the Court since December 1982 concerning the possibility of a fraud upon the Court in the maintenance of this action; and

WHEREAS the Court has continued the trial date of this action to permit discovery with respect to the allegations of fraud on the Court and has ruled that the attorney-client privilege with respect to issues of fraud on the Court has been waived as to plaintiffs; and

WHEREAS the Court has ordered extensive discovery relating to the issues of fraud on the Court, including the further depositions of plaintiffs Cynthia and John Koller and the depositions of Krystyna Janowski, Luis Castillo, Floyd Humphries, Allan Ezrin, Peter Clemente, George Barnes, Nancy Barnes, Nicholas Allis, Patrick Ryan, and Richard Daum; and

WHEREAS it appears from said depositions that a statement was prepared by plaintiffs' counsel on or about December 27, 1982, and caused to be signed by Krystyna Janowski and submitted to the Court by plaintiffs' counsel on or about December 28, 1982 (the "Statement"); and

WHEREAS the Court has completed pretrial of this action but is not satisfied by the foregoing discovery as to certain issues concerning the Statement and whether the testimony of Krystyna Janowski was attempted to be suppressed; and

WHEREAS one of the plaintiffs is a minor and may require separate representation in connection with the protection of her interests; now therefore,

IT IS HEREBY ORDERED that an evidentiary hearing shall be held before this Court commencing at 10 a.m. on March 10, 1983, on the following issue: whether any fraud has been perpetrated on the Court by any member of the firm of Butler, Jefferson, Dan & Allis or any agent or employee thereof in

connection with the actions of said firm during the period December 22 through December 31, 1982, in connection with the obtaining of the Statement from Krystyna Janowski and the submission of Statement to the Court; and

IT IS FURTHER ORDERED that said evidentiary hearing shall be held in order to determine whether any further action by this Court is necessary or appropriate in the interest of the infant plaintiff or the other parties to this action, or in the interests of justice and the proper preservation of the jurisdiction of the Court.

DONE and ORDERED this 8th day of March, 1983, at Washington, D.C.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Excerpts from United States District Court for the District of Columbia Hearing Transcript of March 8, 1983

[7] * * * * THE COURT: Well, let me say this, Mr. Stein. The hearing may result in my finding that there is nothing that needs to be done. The hearing may result in my finding that there may be something that should be done, and if I find that there is probable cause to believe that there is something that should be done, then I will give you notice as to what I think—have you show cause as to why maybe Mr. Allis shouldn't be held in contempt of Court, or why I should not issue a rule to show cause against Mr. Allis, or why I should not order that this Butler, Jefferson, Dan & Allis firm be taken off this case because of improper conduct.

It is so bad that I don't know what is going on in this case. I have done my best to try to find out what is going on in this case, and I have been, unfortunately, stopped on every side. I've been stopped.

So, the only way for me to try to find out what is [8] going on here with respect to the statement that the Butler firm sent me, received by me on December 29th, saying in effect that Krystyna Janowski had recanted everything that may have been said or was said—I can't be sure of the language; I don't have it in front of me—regarding Mrs. Koller, is that a true statement? Is that a true statement? How was that statement obtained? With what knowledge of the facts was that statement obtained? Is in fact the Butler firm trying to suppress testimony by Ms. Janowski by sending me a statement signed by her under penalty of perjury that nothing that was previously said was true, that it was a result of a $15,000 bribe offer?

I have even permitted your clients to depose people with respect to their allegations that this was a $15,000 bribe offer, that the only reason Ms. Janowski said anything was because she was promised a $15,000 bribe, she was promised a comfortable apartment, maybe a trip to the Caribbean, and I don't know.

It has just been unconscionable, all of the allegations and counter-allegations and other allegations that I have received during the course of this case.

I am not being, I think—I know I'm not being facetious and I don't think I'm being out of line when I say that we have reached a point in this proceeding where I need to know what is going on, and I need to know whether what is [9] going on is in the best interest of this minor plaintiff.

True, you are new in the case, as new as yesterday as far as I'm concerned, Mr. Stein. I don't mean to be unkind about it. I saw you in my courtroom one previous day. We were in here for a short period of time that day. I don't know what you were able to pick up on that day about the flavor of this case, but I can assure you that virtually since the third or fourth day of January of this year, there has not been one day in my life when I have not been involved in this Koller case, and I have in my head, if not on my tongue—I have in my head, if not on my tongue, an awful lot of information that does not compute easily, and it doesn't compute easily because, as I've said, I think the Court has been left out of a lot of things.

Now, I have read these transcripts of depositions and I have been very concerned about the way some of the witnesses have responded. I have been very concerned about the way counsel for plaintiffs have conducted some of these depositions.

Why, my goodness, there was one deposition I read where it appears that Mr. Butler, no matter what the question was, Mr. Butler answered it in making his objections.

I need to be able to see these people before me. I need to hear them testify. I need to know what is going on in this case, and, true, as I said, I'm not going into this **[10]** hearing saying that this case is going to be dismissed. There is no reason for me to believe that this case should be dismissed, notwithstanding what findings or what evidence might come out of this hearing that I plan.

I'm not saying that any sanctions will come out. I'm not saying that the plaintiffs will not be able to convince me that there is nothing for me to be concerned about, but the depositions don't leave me with that impression. The depositions leave me with the impression that there is something that I must be concerned about, that I must know about, that I must try to determine, not whether Krystyna Janowski is a credible witness or not, but whether or not whatever Krystyna Janowski knows or does not know plaintiffs have tried to keep from me, and, of course, as I said, I have volumes of transcripts in there. You are welcome to read mine if you wish of Janowski's testimony. It will take you forever. It took me almost forever to read it, because she never says yes or no. She never answers any question short of 150 words, and, as I said, you are welcome to read them if you wish. You are welcome to read anything in this case.

There's nothing in this case that has been hidden from anybody, but there is evidence, in my view, that is being hidden, or not being presented is perhaps the better way to put it. It's not being presented, and I do wonder whether the submission of that statement to me on December 29th was **[11]** designed in some way, to use a word that Mr. Cohen has often used in his deposition in questioning witnesses, to just bring to a halt the Janowski statements by presenting that to me, when

less than one week later—it may have been less than one week later—I ordered her deposition. It's my recollection that I ordered her deposition on either January 3rd or January 4th or January 5th. I'm certain it was in the first week of January that I ordered her deposition, and things have gone downhill from the time I ordered her deposition, and I ordered this deposition notwithstanding that statement that was presented to me, and now that, the circumstances surrounding that statement, have me very troubled, and that's the purpose of this hearing. • • • •

[15] • • • •

Mr. Cohen came back in with a list of witnesses. I think you told me yesterday in the courtroom that you would consult with Mr. Cohen later about your witnesses. So, if Mr. Cohen has witnesses that he believes will help clarify this, I will let him present those witnesses.

Now, if those witnesses basically are adverse in the sense of they are primarily plaintiffs' witnesses, the plaintiff herself or the investigator for the plaintiffs, Mr. Humphries, or Mr. Allis, sure, as I told him, he can cross-examine and treat them like adverse witnesses. I think that's appropriate.

If you choose to call Pat Ryan or George Barnes, and I think the other man's name was Larsen, if you were to choose to call them to help clarify this, I would give you the same courtesy, to treat them as adverse witnesses, because you don't have them under your control.

MR. STEIN: I don't take any issue with that whatsoever.

THE COURT: As I said, this is my motion. I'm concerned. I am concerned about these circumstances. I am concerned whether Mr. Allis or Mr. Allis and the Butler firm presented that statement to me for reasons other than valid and genuine reasons. • • • •

[19] • • • •

Well, I would say this, Mr. Stein. There is very definitely a motion pending before me by plaintiffs requesting an evidentiary hearing. They have also requested discovery. I mean, it hasn't been just the defendant who has sought discovery in this

case—not discovery but new discovery as it relates to Janowski, but the plaintiffs have also sought discovery. They have also sought evidentiary hearings, and I have tried to balance discovery as best I could between both sides.

[20] The $15,000 bribe offer, of course, which plaintiffs have really focused in on greatly, resulted in my requiring the attorney from the defendant's side who contacted Ms. Janowski to be deposed. Their investigators, Barnes and his wife, and Larsen, I think, I also granted them permission to depose them.

So, this has not been just a one-sided affair. There have been, as I said, charges and counter-charges, allegations and counter-allegations. There have been many things going forward in here.

Now, whether or not Mr. Allis has violated a canon of conduct is something that I don't intend to decide or to do anything about, and as I think I mentioned to you yesterday, it is very likely—I'm not saying that it shall happen—but it is very likely that I shall refer whatever conduct I deem inappropriate to the committee, but not at this stage. I'm not that certain yet.

I know that the committee exists and I know its function, but I also know that the function of that Committee on Grievances is to look into attorney misconduct that may have had some effect on the Court or a case. Maybe the attorney has done nothing to affront the integrity of this Court, but there is that issue as to whether or not it has been. It came about as a result of my review of Mr. Allis's deposition. * * * *

Exhibit 17 to Plaintiffs' Petition for a Writ of Mandamus Filed with the United States Court of Appeals for the District of Columbia Circuit on March 9, 1983

(Caption Omitted in Printing)

DECLARATION OF STELLA GRAY

I, STELLA GRAY, being first duly sworn, declare and say as follows:

1. My name is Stella Gray. I reside in Los Angeles, California. I am employed as Office Manager by the law firm of Whann & McManigal, 315 W. Ninth Street, Suite 920, Los Angeles, California.

2. On February 26, 1981, Krystyna Janowski began work as a Legal Secretary under my supervision. For two or three months prior to this, she had worked here as a temporary employee.

3. This employee was known to me variously as Krystyna Janowski, Krystyna Flores, and Krystyna Janowski Flores. She terminated employment from this firm in June of 1981.

4. While working for this firm, Ms. Janowski was involved in several dishonest acts. On one occasion, she told a firm partner that a friend was desperately hurt in Houston, Texas and that she planned to visit him for several days. Upon her return from Texas, Ms. Janowski privately explained to me that she had told a lie. Actually, she had left her husband to stay with an ex-boyfriend for several days. On another occasion, Ms. Janowski came to the office on a Saturday, packed her clothes in some empty file cases, took $46 in petty cash in addition to postage stamps and shipped the boxes to Texas. Upon her return from this trip, she did admit to me that she had taken the money and the stamps. She admitted also that she had had no intention of returning, realizing that she would have been found out if she had stayed on. Further, Ms. Janowski entered the office several times after working hours in the company of her husband. They carried on in such a

noisy and obvious manner as to attract the attention of both the security guard and parking attendant who registered their complaints about this to me. Shortly after she began working as a permanent employee, Ms. Janowski stated to me that she had 10 dependents. Accordingly, no income tax deductions were taken on her regular paychecks. Early in 1982 [sic], a formal notification came to the office from the Department of Internal Revenue stating that Ms. Janowski would have to be considered as a single person with no additional dependents for income tax purposes. Finally, on a Thursday in June of 1981, Ms. Janowski accepted her regular paycheck and immediately quit her employment. She did not remain for the balance of the week for which she had already been paid. I have never seen Ms. Janowski since nor have I been aware of her whereabouts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of February, 1983, at Los Angeles, California.

/s/ STELLA GRAY
Stella Gray
Declarant

Exhibit 18 to Plaintiffs' Petition for a Writ of Mandamus Filed with the United States Court of Appeals for the District of Columbia Circuit on March 9, 1983

AFFIDAVIT

THE STATE OF TEXAS
COUNTY OF CAMERON

I, Roy C. Turcotte, being duly sworn, deposes and says:

1. My name is Roy C. Turcotte. I am an attorney at law, licensed to practice in the State of Texas. My office address is 2370 North Expressway, Sunrise Mall, Suite 17, Brownsville, Texas 78521.

2. I know Christina Janowski. During 1980, she was employed as a legal secretary by my office partner J.L. Covington and myself at 954 E. Madison Street, Brownsville, Texas 78520.

3. During her period of employment she made false statements to an opposing counsel concerning my client's secreting of assets in regards to a divorce litigation.

4. Christina Janowski was discharged for cause. Christina filed a claim for unemployment compensation with the Texas Employment Commission, but her claim was not allowed.

5. During her period of employment I found Christina to be emotionally distraught and untrustworthy.

Dated: March 1, 1983.

/s/ ROY C. TURCOTTE
Roy C. Turcotte

SUBSCRIBED AND SWORN TO BEFORE ME THE undersigned authority on this the 1st day of March, 1983.

/s/ CINDY PEREZ
Cindy Perez, Notary Public In
and for Cameron County, Texas.

My Commission Expires:

8-4-84

Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 10, 1983

CYNTHIA KOLLER, called as a witness by the Defendant, having been first duly sworn, was examined and testifies as follows:

Direct Examination by Mr. Cohen

[11] * * * * Q. Now, could you tell the court what Mr. Butler told you in that phone conversation that you had at 10 A.M.—at 12 noon your time, 10 A.M. Los Angeles time, on December 27, 1982? A. He related to me that there was a person that worked **[12]** in his office who had made some sort of a statement that I had told her that I did not take Bendectin when I said that I took it, and basically—basically he told me that, and basically what he was doing was asking me again, did I in fact take Bendectin when I said that I took it. * * * * **[16]** A. Well, what I testified to in the deposition here about that they would probably need to get a sworn statement from me, I believe that he did that on Monday. He may have done it on Tuesday. **[17]** On Monday and Tuesday, there was a call—at least one call on Monday, and then I made one in the afternoon to him, and then there was another one on Tuesday, and those calls are—to me, they're all one thing. Trying to separate them out is very hard for me. * * * *

NICHOLAS R. ALLIS, called as a witness by the Defendant, having been first duly sworn, was examined and testifies as follows:

Direct Examination by Mr. Cohen

[26] * * * * Q. Now, Mr. Allis, did there come a time when you learned—excuse me. Strike that question.

Am I correct in my understanding, Mr. Allis, that on **[27]** Sunday evening, December 26, 1982, there was a message left

on your answering service by one of the paralegals in your law firm named Richard Daum? A. Yes, on my answering machine.

Q. What in essence did that message say? A. It said, "Call me, it's very important."

Q. And did you then respond to that and call Mr. Daum? A. Yes.

Q. Could you relate to the court what Mr. Daum told you? A. Well, to the best of my recollection, Mr. Daum essentially told me that Krystyna Janowski had called him that day and/or seen him that day and said that George Barnes, defendant's investigator, was pressuring her to sign a false statement and that this false statement would have had to do with Mrs. Koller taking Bendectin. * * * *

[33] * * * * Q. Did you discuss at all the fact of whether Krystyna Janowski had called Davis Polk? A. No. I don't recall that.

Q. And at this point in time, 10 A.M. Monday, December 27, 1982, you had no knowledge as to whether Krystyna Janowski had called Davis Polk; is that correct? A. That is correct. * * * *

[38] * * * * Q. And she had been your secretary since June 1981? A. That's right. * * * *

[39] * * * * Q. Now, there came a point in time after this conversation with Ms. Janowski where you visited her at the hospital; **[40]** is that correct? A. That's correct.

Q. And this was on December 27, 1982, at approximately 11 A.M.? A. Yes.

Q. How long had you talked to her on the phone before leaving the Butler firm to go visit her? A. Matter of a couple of minutes, five minutes.

Q. Was anything substantive discussed about this fraud or bribery attempt? A. Well, yes. I can recall that I asked her simply to tell the truth. My approach in the telephone conversation was that she should—if the defendant or their agents were doing the things that she said that they were doing, that she should stand up and tell the truth, and I made that kind of an appeal to her, and she said—as I recall, she said that she did

not want to be a hero. She may have said at that point that all she wanted to do was to go to Mexico and leave, that kind of a conversation.

I think I said that if Mr.—"If the Barnes and Associates is doing the things that you have alleged, this is in line with what we have understood about them doing previously in Australia and some other places in the United States, and that this isn't right, and it's not fair, and we should make this known."

[41] * * * * Q. Now, you went to the hospital and you had a **[42]** conversation with Krystyna Janowski, and that conversation lasted for approximately two hours; is that correct? A. Approximately an hour-and-half, hour-and-three-quarters, two hours.

Q. And during the course of that conversation, she reaffirmed what it was—she reaffirmed what Richard Daum had told you Sunday night; is that correct? A. Essentially. * * * *

[47] A. At the very end of the conversation, my impression was that I would not be seeing her in the office that afternoon and she was certainly not going to accompany me to the office.

Q. And you did not indicate to her at that time that you were going to come out to her house with a statement that you had already prepared to have her sign; is that correct? A. I did not specifically indicate that to her. * * * *

[48] * * * * Q. Now, when you got back into the office, approximately what time was it, California time, that is, after your meeting with Janowski? A. I would say approximately 1:30 or so.

Q. Did you report to Jim Butler as to what had occurred? A. Yes. * * * *

* * * * Q. And I assume you did not tell Jim Butler that Janowski had called Davis Polk and told Davis Polk that Mrs. Koller did not take Bendectin during the first trimester? A. Well, we discussed that as a possibility, and it was very apparent to me—well, she told me or she lead me to believe in what she had said at the hospital, and I left the hospital with the definite understanding that she had made a telephone call to Davis Polk.

However, this telephone call, she said, came after Mr. Barnes or some other person from the defendant had initially contacted her. She specifically denied saying that—she specifically denied telling me that she had said **[49]** anything to the other side about the case being fraudulent or anything of that sort. But when I got back to the office, we sat around and talked about what had happened, and it was our—I wanted and tended to believe my secretary. I felt very embarrassed for her. I felt very embarrassed for myself. She was my secretary, and I—Mr. Butler at one point said, I recall, that "I'm sorry, Nick. I think that she has made a statement to them of some kind."

All logic led us to believe that she must have said something to the defendants concerning the case being a fraud or else there would be no explanation for the defendants to be out at her house and at the hospital pressuring her, following her around, pressuring her to make a false statement.

But she did not tell me that she had called up Davis Polk and made any such statement.

Q. But did she tell you, Mr. Allis, at the hospital, that she had called Davis Polk? A. All I can say is that I left the hospital with the definite understanding and impression that she had called Davis Polk. I made out a draft affidavit within two days of that conversation. I say in there that she stated to me she'd made a telephone call to Davis Polk after initially being contacted by the other side, but she denied saying anything to the other side about the case being fraudulent.

I do not specifically recall her saying—stating **[50]** that she made the phone call. The statement that does stick out in my mind that she said was a conditional kind of a statement, because I thought, when I was talking to her at the hospital, there's got to be something more behind this than Krystyna is telling me, because she's saying that investigators, et cetera, have come out of the blue, trying to pressure her to sign a false statement. I knew there had to be something more behind it, so I kept trying to bring her back and say, "Krystyna, the thing that I can't understand is why would these people be out pressuring you and following you around to sign a false statement? Why you?" And she would come up with an excuse

about—that "They must have heard that I was very dissatisfied with the firm, and that the first day it rained I wasn't going to come in," and I'd leave that. I didn't want to pressure her, didn't want her to close off the conversation. But I would bring it around again, "The thing I can't understand, Krystyna, is why would they be picking on you."

She finally said a conditional type of statement, "Well, Nick, what if somebody or what if I had made a phone call?" Right at that point, I knew that she had made a phone call of some kind, and she—then we talked a lot after that, and I—she may very well have said that, "I made a phone call," because I left the hospital with the definite understanding that in fact she had made a phone call. But I don't **[51]** recall her making that statement now.

Q. But you do recall—having reviewed in preparation for this testimony—that you prepared an affidavit a couple of days after this particular conversation in which you were ready or prepared to state, as you do in an affidavit, subject to the penalties of perjury, that Ms. Janowski had stated to you that she had called Davis Polk; is that correct? A. I put in that draft affidavit that she told—that she stated that she had called Davis Polk, and that —but that she had denied telling them the case was a fraud and that the phone call came after she was initially contacted by George Barnes.

Q. Now, when you got back to Mr. Butler's office and you were discussing your conversation with Janowski, did Mr. Butler say, "Well, Nick, don't worry about it. I know what's going on. She has called Davis Polk and she has told them that Mrs. Koller did not take Bendectin during the first trimester"?

Did he indicate that he had knowledge like that to you? A. No. He—I remember one definite impression he had was that she was crazy, that it had to do with her having given this premature birth, and I remember us talking about what must have happened to lead up to all these events, and the logical explanation could only be that she had said **[52]** something to somebody to lead Davis Polk or the—to lead George Barnes to be out at her house day and night, as she had described, although there was a part of me that wanted to

believe what she was saying. I think I put forth that position more than most people.

Q. Did you decide to do anything after you relayed—did you decide or did Mr. Butler decide to do anything further after you relayed to him your conversation with Ms. Janowski at the hospital on the morning and afternoon of December 27th? A. At some point in the afternoon, I know I thought it was best if some third person listened to her to see that—to be able to observe her and listen to her, see if she said the same things, and, so, it was decided that Floyd Humphries, a licensed investigator, would be the logical choice. She—

* * * *

[56] A. It would have been—I believe it would have been late in the afternoon.

Q. And that's Monday, the 27th? A. Right.

Q. And at this point in time, you have no knowledge that Ms. Janowski had called Davis Polk and told them Mrs. Koller didn't take Bendectin during the first trimester? A. I had no such knowledge, to the best of my recollection. I can say that definitely, to the best of my recollection, but we assumed that she must have. * * * *

[57] * * * * A. * * * * Now, she left me with the understanding she'd made a telephone call. So, the natural inference was that she made a telephone call, and in that telephone call she said something to indicate to the defendant or to George Barnes that she had some important information, and since they were allegedly trying to get her to sign a false statement about Mrs. Koller taking Bendectin, the natural inference is that she told them—in this telephone call she said something to that effect. * * * *

Q. I don't mean to cut you off, but let me ask you this. If you felt that a secretary in your firm had **[58]** violated a client's confidences and contacted the other side, wouldn't you fire her? A. Well, the first thing I would do, which I did in this instance, was to try to find out what was going on. Now, Ms. Janowski denied to me that she had broached any confidences. She denied that she had told the other side anything about a fraud or about—she said that that was not true, the false statement that they wanted her to sign.

Now, I wanted to believe my secretary, quite frankly. It was embarrassing to her. I knew that she was a little bit emotionally unstable. It was embarrassing to me, because I had—I was her immediate supervisor.

So, there's a whole context of things that were happening then, and I was trying to get to the bottom of them.

Q. But did I understand your testimony to be just a few minutes ago that you and Mr. Butler had a belief that this secretary in your employ, Krystyna Janowski, had called Davis Polk and told them that the Koller case was a fraud? You had that belief, a strong belief; is that correct? A. I think Mr. Butler felt that way more than I did. I had a—I thought that she must have said something to them to lead them along, such as that the case was—well, that—what I thought was that she might have made some comment to lead them to believe that she knew something about Mrs. Koller taking Bendectin, because that was the **[59]** statement—the false statement that she said that they wanted her to sign, but at the same time, I wanted to give her the benefit of the doubt, and I hoped that everything that she was telling me was true.

In other words, I hoped that she was telling the truth that she had not contacted them and told Davis Polk anything about a false statement or anything of that nature and that these people had just somehow come out to her and were trying to pressure her to sign a false statement. • • • •

Q. At this point in time, was any thought—I'm talking now about the afternoon— A. I should also add, because you asked, that I think that I thought, because she had been under a tremendous amount of pressure with the premature child and other problems, that maybe she had had some momentary breakdown. So that there was that consideration, too. I was—I was embarrassed about the affair. I wanted to get to the bottom of it. I was concerned about her. I was concerned about our client, naturally.

Q. Was there any motivation on your part when you were talking with Mr. Humphries and Mr. Butler to protect the Butler firm, to protect yourself, to protect Koller, or to protect your economic interest in the Koller case? A. There were so

many thoughts, but my primary thought was to try to find out what was going on. But if the **[60]** defendants were trying to pressure her to sign a false statement, certainly this was of great importance to our client and our case. So, certainly I had an interest in my client and in what was going on in the case, but my primary—and I was also concerned about what the other attorneys thought. I was also concerned about my secretary. My primary concern was to get to the bottom of this; what is going on; is this happening, what she is describing, and, if so, what has led up to it. • • • •

[62] • • • • Q. But he got the tape recorder at your request? A. I wanted—I wanted to have that conversation taped. I don't recall asking him specifically, "Go out and buy a tape recorder." To me, it would have been more of a mutual talking over what we should do, and that's the agreement we arrived at.

Q. Who gave Mr. Humphries instructions that during the meeting with Janowski, the taping should be done surreptitiously? A. Again, the word "instruction," I don't like the use of the word "instruction." I think it was more of a mutual agreement. I know it crossed my—

THE COURT: Mutual agreement between whom?

THE WITNESS: Mr. Humphries and me.

I know it crossed my mind to have her dictate into a tape recorder her thoughts, but we didn't do that. I think part of the reason was, the same way I mentioned in the morning, we would be going out there at her—in other words, she would be talking to us at her desire or agreement and she could terminate that conversation at any time, and I thought that it was very important to have her relaxed and just tell what had happened, because I still didn't think I had the complete story from her when I talked with her in the **[63]** hospital, and I thought that if she were asked to say something into a tape recorder, this might make her back off in some way, particularly if she was embarrassed about the whole thing, as I thought that she was back at the hospital.

Q. As I understand your deposition testimony and your testimony here today, Mr. Allis, the whole reason for taking Mr. Humphries was to have another person hear what she had to say and evaluate it, because you were still in the process of conducting an investigation; is that correct? A. That's correct.

• • • • Q. Now, did you tell Mr. Humphries that Ms. Janowski had called Davis Polk and told them that Mrs. Koller did not take Bendectin during the first trimester? A. I did not tell him—well, let me answer it this way. No, I did not tell him that Mrs. Koller—that Mrs. Janowski had told me that, but I certainly told him that, "This is our understanding and assumption of what must have happened, that she has admitted that she made a telephone call to Davis Polk; she denies saying anything, but this must have happened." • • • •

[65] • • • • Q. Did you tell Humphries that you had made arrangements with Janowski to come by her apartment on the evening of December 27, 1982? A. I did not say that, but I certainly would have told **[66]** him that at the hospital she wrote out her address and said that she would be happy to see me any time, and we talked in the hospital about her going to her house, her making out a statement there.

Q. Did you tell Humphries that the contents of the statement that you were going to take out on the 27th had been discussed by you and Janowski? A. Yes, certainly.

Q. You told him that that statement— A. Not that particular statement, but the items in it had certainly been discussed with her, because that's why I put them in there.

In other words, she told me that Barnes and Associates—that was the chief—that was the culprit, as I understood it from talking to her—that Barnes and Associates were trying to get her to sign a false statement concerning Mrs. Koller not taking Bendectin, that she would not—never sign such a statement because it would be fraudulent. • • • •

[68] • • • • A. • • • • So, I felt sympathetic towards these problems she expressed in the deposition—at the hospital. And, so, I thought that because of her own mental

imbalance, combined with these hostilities, perhaps she had done something that was very embarrassing to her and that she had come to realize that this was something that she hadn't done—that she should not have done, and she was trying to set things straight and tell the truth, and the truth was that she had never heard Mrs. Koller say anything about not taking Bendectin during the first trimester or any other time, and the truth was that the defendants were trying to get her to sign a false statement, and the truth was that the defendant—again, when I say the defendant, I'm really talking of Mr. Barnes, because that was my understanding of who was **[69]** doing this, and that was consistent with other things we had heard about Mr. Barnes, and the truth was that Mr. Barnes was offering her things such as a comfortable apartment, and taking care of her baby and all of her wants if she would sign this statement. • • • •

[74] • • • • Q. And you also had formed your belief, you and Mr. Butler—perhaps Butler more strongly held—that what **[75]** has triggered all of this is the fact that Janowski has probably called Davis Polk and told them that Koller didn't take Bendectin during the first trimester; is that not a fair statement? A. It is not a fair statement. It would be a fair statement if you just simply said that we thought that she had probably called Davis Polk and told them something to the effect that Mrs. Koller said she hadn't taken Bendectin or some other things about the case that would lead them to believe something was fraudulent or funny about it, yes.

We thought that she'd probably done that by the end of that afternoon, and I think Mr. Butler thought that more than I did.

Q. Now, if the purpose of you and Humphries going out to Janowski was allegedly to have Humphries hear what she had to say and evaluate it, can you tell me what was the need for you to prepare a statement? A. Yes. I thought that she was going to go to Mexico or she said that she was going to go to Mexico or wanted to go to Mexico. I did not want her to go to Mexico. I wanted her to stay and tell the truth.

If she did go to Mexico, I thought it was important to have something on the record, and that was one of the reasons that I wanted her to sign this statement.

I also felt that if, in addition to saying **[76]** essentially the same thing to a third person, Mr. Humphries, if she were also willing to sign a statement and thereby go on the record, that this was a pretty good indication that what she was saying was true. And I also felt that just as a matter of recording what the interview was and the meeting was that evening, that it would be a good idea for purposes of reconstruction of it and trying at a later time, if anything did happen, such that she went to Mexico, and if something did come up in terms of something that she had said to the other side, that it would certainly be good to have something solid we can point to.

That's why I wanted her to sign a statement, assuming that it was true and assuming that she said the same thing in her apartment, and that's the reason why I also thought it would be a good idea to get her down on a tape recorder.

Q. But your purpose in this statement was to get a true, accurate and full chronology of the events; is that not correct, sir? A. It was certainly an attempt to get a true and accurate chronology, but it was in no way attempted to get a full chronology. Somebody had suggested at the very end of the afternoon, "As long as you're going out there, why don't you type up a very simple statement."

Q. Who was that someone, sir? **[77-85]** A. I don't recall. And that's how this statement came about. So, I just tried to put the guts of what I thought she—that what I knew and thought that she was telling everyone, which was that Barnes was trying to get her to sign a false statement, offering her things for it, and that the matters contained in the false statement had to do with Mrs. Koller taking Bendectin, and she wouldn't sign it because it wasn't true. • • • •

[88] • • • • Q. And the purpose—your testimony is that the purpose of this statement was to reduce to writing the events that had occurred that were related to you by Janowski; is that correct? A. The purpose was as I stated before.

One of the purposes is something along the lines of what you have stated, which was to get down the guts, the important guts of what she was telling us was going on, which was that she was being asked to sign a false statement and being promised things for it, and she wouldn't do it because it wasn't true. • • • •

[89] • • • • Q. Was one of the purposes of this statement to have Janowski retract any statement she gave Davis, Polk? A. If she had made a statement that was contrary to this to Davis, Polk, certainly I wanted her to say what the real truth was, and that would involve retracting it.

Q. Was that the primary purpose of the statement? A. The primary—

[90] MR. STEIN: Your Honor, again, I think this is repetitious.

THE COURT: That isn't. That question isn't repetitious.

The question is was that the primary purpose of the statement.

THE WITNESS: The primary purpose of the statement—well, first of all, there were several purposes of the statement. I'm not sure I can tell you what was the primary purpose.

THE COURT: Can you tell us whether it was one of the primary purposes, because that's the question?

THE WITNESS: Certainly.

If she had made a statement to Davis, Polk, or to George Barnes that she had heard Cynthia Koller say she did not take Bendectin, certainly I wanted that, the truth, the true statement, the true facts, to be set down here. And that would involve a retraction of any statement like that, yes. • • • •

[91] • • • • Q. Is there some reason, Mr. Allis, that you didn't include, and since you have testified you wanted the true facts in this statement, the fifteen thousand dollar bribe attempt? A. There's no particular reason except that all I

was trying to put in this statement was the very guts of what she told me in the hospital.

She had not mentioned anything about a fifteen thousand dollar bribe in the hospital.

I also stated there are many things that are not in this statement; for example, she told me very clearly and in detail about how they were threatening her, and I didn't put that in. * * * *

[92] * * * * A. I didn't say that he had been trying to get her to sign a statement because I thought it was George L. Barnes and Associates that was the real culprit, and it made sense to me from what we knew about Barnes that that could be the fact. * * * *

Q. At the time that you had her sign this statement you also still had the belief, did you not, sir, that she had called Davis, Polk first; is that correct? A. I thought it was—I thought that she had said something to Davis, Polk at some time to lead them on, or to George Barnes.

I don't think I specifically thought she has made a telephone call first, before being contacted by anybody.

But I thought that at some point in her dealings that she had said something to them to lead them on to believe that Mrs. Koller hadn't taken Bendectin.

It was certainly probable, logically, that she **[93]** would have had to have initiated this in some way.

Q. But my question was— A. But as far as a definite belief, I always wanted to believe her, and part of me did believe her.

Q. Let me ask it this way, sir.

At this point in time that you had her sign this statement, you did not know if this was a truthful statement; is that correct? A. Yes, I thought it was a truthful statement, definitely, absolutely.

Q. You thought the defendants had attempted to bribe her first, is that it, without being contacted by her or anything of that nature? A. This statement doesn't say that.

It says Mr. Barnes and other—

THE COURT: That isn't what he asked, about what the statement said. He asked is that what you thought. * * * *

[94] * * * * Q. And during the course of the conversation that you had with her you pulled this out of your pocket and she sort of signed it without basically reading it closely; is that a fair statement? A. That is not a fair statement at all.

She spent a long time reading it. She made corrections to it.

Q. Did she say to you, sir, that, I better make some changes, you know, in the statement so that it will sort of look proper, and Mr. Humphries says, yes, yes, you've got the idea; do you recall that occurring? A. I recall a statement in the tape to the effect, something about her making corrections, it would look better if I made corrections, some off-the-wall comment such as that. * * * *

[95] * * * * Q. Did you agree to an arrangement in which she would not have to come into your offices, but, instead, you would send a typewriter to her house so that she could work at home? A. After the statement was signed, yes.

Q. Did you ever send the typewriter to her house? A. No.

Q. She remained on your payroll until she quit; is **[96]** that not correct, sir? A. I believe she did.

Q. And after this, although she never came to her office and did one day's work, and you never sent the typewriter, she continued to be paid; is that not correct? A. I gave her a paycheck on the 31st, which was four days later.

The next day we got a letter from — indicating that she had contacted the other side and said the case was fraudulent, something of this nature, and so I didn't know what was going on, and she didn't come in.

Then, when she got down there Friday she was very upset and yelling about kidnapping the baby, and where is my paycheck, and I gave her whatever she was due.

I presume that was pay up to that Friday, but I don't really recall. * * * *

[98] A. There was nothing formal discussed about her pay during those times in any way, shape or form, other than she was, hopefully, still an employee.

I wanted her to stay working and not go to Mexico.

And so when she came in on that Friday to get her paycheck, I went up to the office and asked for the paycheck for what she was owed, and I assume that that was pay up until that day, because she was still on the payroll. * * * *

[99] * * * * Q. Another area that I understand was discussed that wasn't on the tape was your conversation with her concerning a psychiatrist; do you recall that, Mr. Allis? A. Yes.

Q. All right.

And you suggested, as I understand it, that if the pressures got too great on her she might want to see a psychiatrist; is that correct? A. No.

After the statement had been signed and when we were standing up, getting ready to go, again, thinking of her welfare and my impressions of her, I asked her something to the effect of, if you feel like you need a psychiatrist to talk to, or a counsellor to talk to, I'm sure that insurance would cover it. She said that she did not.

I should point out—I think it's undisputed—I had asked her that, advised her to see a counsellor about nine, ten months previous to that, when she had written a memo of that kind to our office manager, also.

So I thought that she must feel pressured by all of these events, even though she seemed so inappropriately almost calm and enjoying the situation.

Q. But if you believed that, sir, why would you in Defendant's Exhibit One, your statement, say, as you typed it **[100]** in the afternoon, in your office, "Today I feel calm and my mind is free and clear"?

Why did you put that in? A. Because she seemed that way.

As I just mentioned, she seemed almost inappropriately, I thought, calm and on top of things.

She spoke so easily. She was laughing and chattering, both at the hospital and at her apartment.

Q. But you didn't believe that inside that she was that way; is that correct? A. Yes. She seemed that way. But I thought it was inappropriate to the situation that she was describing. * * * *

Q. Did she agree to sign this statement prior to your even removing it from your pocket? A. Yes. I thought that—yes, she did.

I thought that that was the gist of why I removed it, that the conversation led up to—covered the essentials in the statement.

She essentially confirmed that, and then asked if she would be willing to sign a statement to that effect and she said she would. That was before I took it out. * * * *

[101] * * * * Q. Now, are you familiar with a letter that was signed by James Butler and sent to Judge Johnson at the United States District Court for the District of Columbia, which was dated December 28th, 1982? A. Yes.

Q. Did Mr. Butler show you that letter? A. Yes.

Q. Did you read it? A. Yes, I'm sure I did.

Q. Did you suggest to Mr. Butler that in terms of explaining to the Court what had occurred here, and to be extremely truthful, it might be better to include the fact that we believe that Janowski had called Davis, Polk?

Did you discuss that with him? A. I do not recall discussing that with Mr. Butler.

Q. In the letter did you indicate to Mr. Butler that in the spirit of candor it might be better to mention the fact of Mr. Humphries and the surreptitious tape recording? A. I had no conversation with Mr. Butler about including that, but the tape recorder certainly bears out my opinion what the statement says, and everything she told us before. * * * *

[102] * * * * Q. * * * * Did you and Mr. Butler discuss that it would probably be in the interest of candor better to inform the Court that Janowski was going to remain on the payroll at home and would be allowed to work at home, at her own time and her own choosing, and that a typewriter was going to be sent to the house?

Did you think about including that? A. You've said a lot of things.

We did not think about including that.

That was in no way remuneration.

At the very end of the tape, after she signed the statement, she says, this has nothing to do with remuneration, but could

you have my paycheck and my vacation check ready for me on Friday, so Luis can pick it up.

Q. We have established, though, have we not, sir, that **[103]** from the week of December 27th until the time she quit she did not come into your office or perform any services fo you; is that correct? A. She did not.

Q. And she was paid. A. I assume that that paycheck I gave her on Friday included that, but certainly there had been plenty of days she hadn't come in, including days between the birth of her baby and then, that she had not come in and been paid for.

Q. Did you think about including in the December 28th letter to the Court the fact that Mr. Carl Schuck was involved in this matter, as related to you and Mr. Butler by Richard Daum? A. In the letter to the Court?

Q. Yes. A. I don't recall any conversation with Mr. Butler to that effect, but certainly it would have only supported our version of what happened, because, as I understood it, Mr. Schuck was out there with the defendants, trying to do what she said what was happening. * * * *

[105] * * * * Q. Now, as I recall your testimony, Mr. Butler had a strongly held belief—much stronger than yours—that Janowski had called the other side initially; has that not been your testimony? A. My testimony has been that Mr. Butler and I—I think Mr. Butler more strongly than I—thought that she must have said something to the defendant at some point in time to lead them on, and the logical—I think our logic, based on what she said, was that she perhaps had made a **[106]** telep'one call, and that's the time in which she said that something was—that Mrs. Koller hadn't taken Bendectin.

Q. Is that contained in this letter? A. Out [sic] belief to that effect? Q. Yes. A. No.* * * * A. * * * * **[107]** She said that the defendant—she had made this mistake—an emotionally somewhat unbalanced woman with a premature child and so forth—said something to lead them on, and despite that fact, the defendants kept going back and trying to manipulate her to sign a statement that would contain this false statement all these days, while we knew nothing about it.* * * * ,

Cross Examination by Mr. Stein

[120] * * * * Q. * * * * Let's say you had doubts about Mrs. Koller's claim. Does that mean you're authorized to abandon it? A. Not as I understand it.

But I want to reiterate, I never had the slightest doubt about her claim.

Q. But I want to fasten your attention on this. Let's say you did have doubts. Does that mean you **[121]** would have been warranted in withdrawing from her representation? A. No.

Q. And you've said that you do not have doubts. A. I have no doubt at all.

Q. But the fact that you do or do not have doubts, is that really significant for an advocate? A. It's significant for me as an advocate, but under the canons, I don't think so. * * * *

[122] * * * * MR. STEIN: You may proceed.

[123] THE WITNESS: She is being put up in a six hundred dollar apartment, paid for by the defendant. Previously, she had been living in a two hundred apartment.

She is being given a rental car.

Her consort is an illegal alien and is being given legal assistance for his immigration problems.

Certain medical expenses were paid for her, although the attorney, Schuck, said they would be reimbursed out of insurance or something. And there are, as I understand it, unspecified other expenses.

Q. Did you become aware of any specific mental problems that she had after this Janowski affair commenced on December 27th, 1982? A. Yes.

Q. What did you become aware of? A. Previously, she had entered a plea of innocent by way of insanity. This was back in the late sixties or middle sixties.

She was under psychiatric and psychological treatment from four or five different people during that period of time.

MR. COHEN: Your Honor, this objection I intend to let stand, and of course, Your Honor has to rule on that.

Seems to me that the instruction on this was that **[124]** Ms. Janowski's credibility was not at issue in this hearing; this was a narrow hearing, dealing with the purpose of the statement and the letter, and the dates, December 26, 27th and 28th.

For that reason I object. * * * *

* * * * THE COURT: I don't agree with you. I don't agree with you, and as far as I'm concerned, Mr. Stein, you have been outside of the scope of the direct examination a bit **[125]** too far anyway.

Now, they have not objected, but clearly, what he knows about her past mental history, unless it relates to something that you first submit or determine through questions, had to do with her answering a different questions on that day, it's irrelevant.

So I sustain the objection. * * * *

Redirect Examination by Mr. Cohen

[131] * * * * A. * * * * I wanted to find out what the truth was and to try to establish in some more definite way what was going on, and we notified the Court what was happening the very next day.

[132] Q. On December 27th, when you went out to the apartment to clearly establish, can you indicate to the Court what additional information you gained at her apartment on December 27th that you did not know earlier? A. Yes.

What was important to me, in terms of—I think what you're getting at is that she said the same thing again that she had said several times.

MR. COHEN: Your Honor, I'm going to interrupt now.

THE COURT: Please just respond to the question.

THE WITNESS: I think that this is additional, Your Honor.

THE COURT: Well, just tell the additional information.

THE WITNESS: In other words, what was important to me in establishing this was the—

THE COURT: I don't care what was important to you.

Just tell me what the additional information was, and then after you tell me what the additional information was, you might choose to tell me what the importance to you is, of the additional information.

THE WITNESS: It was additional information to me that she was willing to sign a statement and say the same things before a third party. That was additional and corroborative. It wasn't different, but it was additional.

[133] THE COURT: Her willingness to sign the statement, you considered additional information about the allegations that had been made?

THE WITNESS: It wasn't different, but I thought it was additional.

In other words, it was one thing on top of what had already been said orally. And if she were willing to actually sign the statement, as well as say it before a third party, to me this was additional information that what she was saying was true. * * * *

[136] * * * * THE COURT: * * * * When were you first aware, or had the feeling, that Miss Janowski had been in contact with the defendant, or its agents, regarding substantive matters touching on the Koller case?

THE WITNESS: Well, during the visit to the hospital she—well, I would say Mr. Daum also said that she was being pressured. So I got the impression and understanding that she had had conversations. I didn't know what they were about. * * * *

[137] * * * * THE COURT: * * * * When were you first aware, or had a feeling, that Miss Janowski had been in contact with defendant, or its agents, regarding substantive matters touching on the Koller case; that is, saying anything about Mrs. Koller, or anything about any aspect of the Koller case?

THE WITNESS: I suspected, when I was in the hospital with her on Monday morning, that there must be something more to it than she was telling me.

THE COURT: All right.

THE WITNESS: I didn't know, but I suspected it and tried to get it out of her.

THE COURT: So you first had that feeling while you were at the hospital?

THE WITNESS: That is correct.

THE COURT: All right.

THE WITNESS: Of course, there was also a part of me that also wanted to believe her, and did believe her.

THE COURT: Well, that is not the question. The question you have answered. It was while you were at the hospital.

[138] THE COURT: When did Mr. Butler first mention his view to you that he believed she had been in contact with them on substantive matters?

THE WITNESS: On Monday afternoon we discussed that she must have said something, which must be something substantive, to the other side, in order to lead them on in some way, whether it was after being contacted by them or at some other point.

THE COURT: About what time would that have been, since the afternoon spanned several hours?

THE WITNESS: It could have been anywhere from the time I got back, which was approximately 1:30 or 2:00 o'clock, until 3:00 or 4:00. • • • •

[143] • • • • THE COURT: Why did you have any question in your mind about truth or falsity before you went to the hospital?

THE WITNESS: Because the whole thing sounded so bizarre: that George Barnes was trying to get her to sign a false statement.

I just wanted to find out what the truth was and get it out.

THE COURT: You knew—

THE WITNESS: The whole story sounded so bizarre about floor plans, fire-proof cabinets, and so forth, that—

[144] • • • • THE COURT: So the story that you had heard from her and Mr. Daum, you deemed so bizarre that you felt that that story was not true? • • • •

THE WITNESS: No, but I wanted to sit down with her and go over the version, go over the situation, and find out what was true and what was not true.

I certainly did not come to the conclusion then that her version was not true. In fact, there was a part of me that believed her all the way through. Even after we were there in her apartment, I believed her, definitely. There was that part of me that wanted to believe her. I could not face believing that my own secretary had done something that was treacherous.

So there was a part of me that always believed that what she was saying was completely the truth.

Then, after we got to her apartment, I believed it even more, after we left.

In fact, I called up Mr. Butler, and I— • • • •

[146] • • • • THE COURT: • • • • Well, if you came in at approximately 9:00 o'clock, **[147]** can you recall whether you saw the letter before you went to take what is normally a lunch break, or did you see it after the lunch break?

THE WITNESS: I really have no recollection of when I saw the letter. I can construct—what I would construct is that when we get things delivered from Davis, Polk, they are ordinarily delivered in the morning.

If this were delivered in the morning, I presume I saw it then. If I had to guess, I would say I saw it in the morning, but I have no recollection.

THE COURT: I really don't want you to guess, and that is why I was trying to help your recollection—

THE WITNESS: Yes.

THE COURT: (Continuing)—as to whether you saw it between the time you came in and the time you would normally take a lunch break, or after your lunch break and before you left for the evening.

Let me see if I can help you in this respect: Did not the letter from Davis, Polk, of December 27th, have as enclosures the telephone messages from Miss Janowski?

THE WITNESS: No, I—no.

THE COURT: You do not recall seeing those?

THE WITNESS: I am quite sure it did not. I would have remembered that.

THE COURT: Well, the contents of the letter **[148]** were, for want of a better word, "damning"; were they not?

THE WITNESS: Yes.

THE COURT: And even with that type of a message, you still say you cannot recall whether you saw it in the morning or in the afternoon?

THE WITNESS: I don't recall when I saw that letter, Your Honor.

THE COURT: Okay.

THE WITNESS: There were so many bizarre events happening in that two-day period that it is—it seemed like it was one on top of the other.

THE COURT: What else bizarre happened on the 28th, besides the receipt of that letter?

THE WITNESS: Well, the fact that this had happened on the 27th. We got into the office on the 28th. I am sure I went in and told Mr. Butler about the statement she had signed and probably told him what had taken place.

THE COURT: That was not bizarre.

THE WITNESS: Pardon?

THE COURT: That was not bizarre. So what else was bizarre?

THE WITNESS: I thought everything was bizarre, Your Honor. I really did. I thought that the whole event—the whole event was the most bizarre thing that has ever happened to me.

[150] • • • • THE COURT: All right. On her last full day on the job, did she act as your secretary?

THE WITNESS: Yes. I—there were different things being handled at different times, but I don't recall. • • • •

She mentioned it several times in the fall: how she would like to work at home after the baby was born, and she could have tapes at home. She mentioned it to the other people that I know about, also, that—

THE COURT: Well, I am talking about you.

THE WITNESS: She mentioned it to me.

[151] THE COURT: And had she mentioned that to you before the birth of the child?

THE WITNESS: Yes. she did. • • • •

[153] • • • • THE COURT: • • • • I think you also testified earlier today that Miss Janowski denied anything about a fraud. How did the question of fraud come up for her to deny?

THE WITNESS: Well, in the hospital she told me: the defendants are trying to get me to sign a false statement that Mrs. Koller said she did not take Bendectin.

And, in my own mind, I wanted—what I kept telling her was—I kept bringing the conversation back to that, because she would then diverge into current events, and so forth.

And I said—kept telling her: I can't understand why they are out there talking to you, pressuring you to sign a false statement. Why would they pick on you?

In my own mind, it was only logical that she must have led them on in some way. And so I said: Did you say anything to them concerning Mrs. Koller taking Bendectin, or anything else that would result in them being out there, after you like that?

And she always specifically denied that. She denied that she had said anything like that to George Barnes, or anybody else.

And there was a part of me that wanted to, and did, believe that. But there was another part that—

[154] THE COURT: I believe you have answered the question, Mr. Allis.

Why did you think it was a good idea to get Miss Janowski's statements on tape?

THE WITNESS: Again, to—I wanted—particularly if she went to Mexico, I wanted to have some sort of a record of it. That was one thing.

Another thing is that if—I wanted to be able to reconstruct what happened, and so there would be an accurate reconstruction of what happened, during that conversation, or interview.

So that is essentially why I wanted to tape it.

THE COURT: Now, at the same time you also wanted to have a third party listen in?

THE WITNESS: That is right.

THE COURT: Is that correct?

THE WITNESS: Yes.

THE COURT: What was the purpose of having a third party listen in, if you were going to tape her anyway?

THE WITNESS: Well, the third—the investigator would be doing—I wanted the investigator to listen to her, so that he could try to evaluate and listen to her. There was no—there was no—there were no facial expressions, et cetera. There is no guarantee that a tape would be successful.

[155] I had never taped anybody before, and I wasn't carrying the tape, myself. He was going to be doing the taping.

So a tape would be no substitute, in my opinion, in any way, for an on-the-spot, third-party ooserver. • • • •

THE COURT: All right. You also testified earlier today that you felt uncomfortable speaking to Miss Janowski. Why was that? • • • •

[156] • • • • THE COURT What about on the 27th?

THE WITNESS: On the 27th?

THE COURT: Yes.

THE WITNESS: I—again, the whole thing was so bizarre. I didn't know whether she was crazy, or what was going on.

So there was a little part of me that day that felt a little uncomfortable talking to her, and I certainly didn't want

to talk to her again without—unless there was some good reason to, like a third party, until she came into the office and made out the kind of a three- or four-hour statement that she said she was going to.

So far as feeling uncomfortable otherwise, I definitely, after getting the letters from the defendant on the 28th, and then the contact with Mr. Schuck—I certainly felt uncomfortable about talking to her on the 3rd—on Friday, the 31st, and then, again, on Monday, the 3rd, which I think is where I said I felt uncomfortable talking to her.

THE COURT: Well, you knew about Mr. Schuck before you went out to the hospital; didn't you?

THE WITNESS: I did know about Mr. Schuck. I had been led to believe that he was basically working with them. And later, after we got the letter from the defendant, **[157]** it was presented that he was an independent attorney. That they had arranged for him.

And then I found out who he was, and Mr. Butler talked to him, and he spoke—I guess the whole—

THE COURT: My question was: You knew about Mr. Schuck before you went to the hospital; did you not?

THE WITNESS: I knew of the existence of Mr. Schuck.

THE COURT: Well, you knew that he had also been in touch with Miss Janowski; did you not?

THE WITNESS: I don't recall whether I knew that before I went to the hospital, but I certainly knew it at the end of the visit to the hospital: that an attorney named Schuck had come to her apartment on Friday and—

THE COURT: Did not Mr. Daum give you and Mr. Butler those cards that morning when you came to work?

THE WITNESS: He may very well have. I don't have a specific recollection. But I certainly—as I say, I certainly knew it within a few hours of them. • • • •

[160] • • • • THE WITNESS: I do not recall, Your Honor, who made the initial suggestion to prepare a simple statement.

THE COURT: Well, it was not quite a simple statement; was it?

THE WITNESS: Yes.

THE COURT: It was a simple statement?

THE WITNESS: Yes.

THE COURT: What was simple about it?

THE WITNESS: Well, it is very short. All it intends to do is to set down the very essential, bottom line of what she was telling us, in just a couple of sentences. And that is what was simple about it. • • • •

[163] • • • • THE COURT: • • • • What was there in the—I will get to that later. You testified earlier today that after leaving the hospital and talking with Miss Janowski, that you did not have the complete story; is that correct?

THE WITNESS: Right. That is correct.

THE COURT: Well, would you tell me why you felt you were competent to preparre a statement for her to sign, based upon your conversations at the hospital.

THE WITNESS: Yes, because she had reiterated what was in that statement a number of times at the hospital, and I was not trying to give her a third degree, and I was not trying to question her, but simply to draw her out.

But, even in that process, she had—I had subtly questioned her: I can't understand why they are doing this, that type question.

And she had essentially reiterated what I put in that statement several times, and that is exactly what I understood she had also told Mr. Daum.

So I was convinced it was true.

THE COURT: So you knew, then that that statement did not have the complete story, because you had not heard the complete story?

[164] THE WITNESS: The statement that I drew up was not intended in any way to be a recitation of everything that she told me at the hospital, or even everything that was relevant at the hospital.

But it was intended to be an accurate summary of the essential, bottom-line point, and it was: that she said that—she told me several times and she told Mr. Daum, as

I understood it, that the defendant was trying to get her to sign a false statement which had to do with Mrs. Koller not taking Bendectin.

And that this was a false statement, and she was being offered, she told me, an apartment and other things for that statement.

And it was not true. That she had never had any such conversation with Mrs. Koller, and never heard Mrs. Koller say anything like that.

And that had the definite ring of truth to me, and I believed it.

THE COURT: At that time—

THE WITNESS: And I believe it today.

THE COURT: Well, your belief is not at issue here. • • • •

[165] • • • • THE COURT: Now, just before we went for the luncheon recess, you said that the additional information that you had, following your visit to her home that evening, was her willingness to sign the statement that you prepared and presented to her.

Just what did her willingness to sign mean to you?

[166] THE WITNESS: It meant that the statement was truthful. That if she were willing to sign it—

THE COURT: That is, the statement that you had prepared?

THE WITNESS: Yes.

That if she were willing to sign that, and sign it under penalty of perjury, that that was a good indication that it was truthful.

I also will say that the additional information also included her saying this again before a third party.

THE COURT: And that third party was Mr. Humphries?

THE WITNESS: Right.

THE COURT: She knew Mr. Humphries; isn't that correct?

THE WITNESS: She did.

THE COURT: She knew that he was an investigator whom your office had used?

THE WITNESS: She did, and I thought that she felt comfortable—

THE COURT: I am not asking you what you thought.

THE WITNESS: (continuing)—with him.

THE COURT: But she knew that?

THE WITNESS: Yes.

THE COURT: All right. • • • •

ALLEN T. EATON, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen

[176] • • • • Q. All right. Directing your attention or—strike that, and let me ask it to you this way, Mr. Eaton. When **[177]** did you first become aware that Krystyna Janowski had contacted representatives of the defendant and advised them that Mrs. Koller had not taken Bendectin during the first trimester of her pregnancy? A. I don't think I ever learned that. If I may explain, Mr. Cohen—

Q Oh, certainly, sir. A. (continuing)—When you asked the question, you said: When did I first learn that she had contacted the defendants and told them that.

Q. Yes. A. The first time that I read that was on the morning of the 28th, when I came to work. It was sometime prior to 9:19. • • • •

[180] • • • • A. • • • • But in this particular instance, what Mr. Butler called me about, as best as I might recall it, was to tell me that he thought that one of the secretaries had a post-partum psychosis. • • • •

[181] • • • • A. As best as I recall, he said—I do recall him specifically saying that Barnes was somehow involved. We were very familiar with that, and we were concerned about a possible breach of security because of their prior activities with respect to other witnesses in this case. • • • •

[196] • • • • A. • • • • Now, I later had learned—and it

is hard to separate what you learn in depositions later on from what you were told at a given time, but I believe I was told that a lawyer had been out there. • • • •

[201] • • • • A. Now, I do remember something else on the 27th. I had been told that this lady said that Mrs. Koller did not ingest Bendectin during her pregnancy, or during the first trimester. I don't remember which.

Q. All right. **[202]** A. And I do recall telling Butler at that time that that was absurd, or words to that effect. • • • •

FLOYD T. HUMPHRIES, JR., called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen

[216] • • • • Q. Now, you indicated that one portion of the plan was to tape her, but preferably with her consent. Was that a correct understanding of your testimony? A. That was Mr. Allis' preference.

Q. Yes. A. And it would have been mine, circumstances willing.

Q. Was there some reason why you could not ask Krystyna Janowski for her consent? A. There was no reason why I couldn't have. Of course, I could have.

Q. Did you or Mr. Allis ask for her consent, when you went to her apartment?

Q. Did you advise her that she was being taped surreptitiously? • • • •

[217] • • • • MR. STEIN: That is like carrying a concealed gun openly, Your Honor.

THE COURT: Well, that is done in this country, but please go ahead.

Mr. Cohen: I withdraw the question.

Q. You never told her that she was being taped, sir?

A. No, sir.

Q. Now, was another part of the plan that was devised by Mr. Allis the preparation of a statement for Miss Janowski to sign. * * * *

[219] Q. And, having the statement in front of you, sir, would it be fair for me to state that one of the principal thrusts, or the principal purposes, and part of the plan in preparing this statement, was to get a retraction from Krystyna Janowski, if she had made any statement to representatives of Davis, Polk? A. Yes, it is. * * * *

[223] * * * * A. * * * * I cannot differentiate the contents among this call, conversations I had at the office, and subsequent conversations I have had with Richard Daum. They all seem to come together. **[224]** I can't pinpoint specifically what was said on each occasion, other than as generally as I have just said it now. * * * *

* * * * Q. Now, I would like to turn to an area entitled "Information about the Janowski incident from Nick Allis."

If you will turn to page 34 of your deposition—well, I think, to make sense, Mr. Humphries, we need to start at 33, at the bottom of the page.

"QUESTION: All right. Now, you and Mr. Allis went together out to Mrs. Janowski's apartment on the evening of the 27th; is that correct?

ANSWER: That's correct.

QUESTION: What had Mr. Allis told you about his prior conversations with Miss Janowski concerning Cynthia Koller's **[225]** conversation; what he told you?

ANSWER: Very little. I—he told me conversations from Richard Daum which he incorporated into what he knew. I did remember that it was Nick who knew all of this. Also, but between the two of them, it might have been partially Nick's knowledge that Krystyna had admitted to talking to members of the Davis, Polk, and Wardwell firm, an investigator saying that Mrs. Koller had not taken Bendectin during the first trimester of her pregnancy."

Was that question asked and answered, sir? A. Yes, it was.

Q. Was it true? A. That is my best recollection. * * * *

[226] * * * * Q. * * * * Do you know if the contents of this statement, Exhibit No. 3, which is now defendant's Exhibit No. 1, had previously been discussed with Miss Janowski?"

ANSWER: Yes.

QUESTION: How do you know that?

ANSWER: Well, Mr. Allis told me that he had discussed earlier that day the importance of getting the statement signed, reputing what she had apparently had allegedly said to someone at the office of Davis, Wardwell, and Polk [sic]. From Mr. Allis I understood and gathered, and was told, that **[227]** he had discussed this statement over the 'phone, and that was one of the purposes of his coming over later, which he had told her would happen."

Was that question asked, and was that answer given? A. The word is "repudiate" on line 20, counsel. It is a misprint. * * * *

A. That question was asked and answered. That is quite correct.

Q. And was it truthful when it was answered? Were you truthful when you answered it? A. Yes, I was truthful. * * * *

[227] * * * * Q. * * * * I am not sure I ever found out, Mr. Humphries, why you were unable to advise Miss Janowski that her conversation was being recorded. Did I ask you that?

THE COURT: No, you did not ask that precise question.

[228] MR. COHEN: Thank you, Your Honor. * * * *

Q. You indicated that that would have been preferable; that would have been your desire; that would have been Mr. Allis' desire. But, for some reason—and I don't recall whether you ever really gave me that reason—it was not done.

Can you share that with us? A. I would be delighted to, sure. When I say I would prefer to take a statement with the consent of the person questioned, that is always my preference.

Under the circumstances, I felt uncertain and very unclear as to the reaction that Krystyna Janowski might have.

I had not assessed and I had not determined in advance her readiness and her agreeability to have her statement taped.

I, further, felt that the subject matter was so critical and so sensitive and so much hung on it, in terms of the future of a very important and severely injured victim here, that, in order to be very certain that there would be no element of pressure or discomfort, hesitation, on the part of this witness, it would be best to tape this conversation without her—without her knowledge.

She was not told that it was not being taped, the conversation.

[229] • • • • Q. • • • • Now, do you recall Mr. Allis telling you: Well, Mr. Humphries, what I would really like you to do is to just walk on over here with me and listen to what she has to say and just evaluate it. Because I don't know if any of this has happened or not.

Do you recall him saying that to you? A. I think words to that effect. That sounds familiar.

Q. Well, do you recall? A. That is my recollection. • • • •

[234] • • • • Q. And Miss Janowski agreed to sign this statement, really, before he even pulled it out of his pocket; is that a fair statement? A. She agreed to sign such a statement.

Q. And then there was a colloquy between you and her and Nick where you said: Go on, pull it out, Nick. Pull it out. Did something like that happen? A. Yes, that's correct. • • • •

[235] • • • • Q. • • • • Is there any reason, as this plan was being designed and devised, as to why neither you nor Mr. Allis, nor anyone else at the Butler firm, talked to Carl Schuck? Can you give me any explanation? If you are trying to evaluate the veracity of Janowski, why wouldn't you talk to Carl Schuck? A. It was my understanding, speaking for myself, that she had not retained Carl Shuck at that time. She was not represented.

Q. Well, in addition to evaluation, weren't you and Mr. Allis still unsure of the truth of what was going on, and

weren't you still in the midst of an investigation and a search for the truth? A. Absolutely. • • • •

[237] • • • • Q. • • • • When she indicated that she would sign something and when you said, "Pull it out, Nick," and he pulled it out, did Miss Janowski say something like: "I have to cross something out to look like I did something"?

Do you recall those words? A. Yes, sir.

Q. What did they mean to you? A. It meant to me that Krystyna Janowski was very consciously and deliberately and agreeably assisting in the signing of this statement in such a fashion that it would have increased credibility as being her own.

Because when a statement is simply signed at the bottom, it carries less credibility than it might, were she to cross words out, correct them, make spelling corrections, and **[238]** so forth.

And she wanted to do this for that reason. • • • •

Q. And after she made that statement: "I have to cross something out to look like I did something," you said: "That's right. You understand. You understand."

What did you mean? A. I meant that she understood that this statement would be a stronger statement. That it would carry greater credibility as her own statement, were she to do this. And I was saying that I recognized that she understood this principle.

Q. Not necessarily more truthful, but more believable; is that what you mean by "credibility"? A. Well, I just mean the statement is a more valid kind of statement. You can use all of those words. They are all fine by me.

Q. Well, I am trying to find out what you mean. Do you mean that if you were to present this statement to **[239]** someone, the chances of them believing the contents would be enhanced, because it looks like Janowski had a hand in preparing it? A. She thought so, and I—

Q. You also did; did you not? A. (continuing)—also would agree, being an old statement-taker. Sure. • • • •

[240] • • • • Q. • • • • But were you aware at the time of having her sign—you and Allis having her sign the state-

ment, that it would be sent to a court? A. Well, not necessarily. I can tell you what my feeling was with respect to that, if you want me to add anything.

Q. Well, did you and Allis discuss the use to which you would put this letter? A. No, we didn't, not specifically.

Q. And you have indicated one of the purposes of the statement— A. Oh, may I—

Q. I am sorry. Sure. A. Yes, we did, and I will have to tell you what we did discuss.

Q. Certainly. Go ahead. A. I think I probably volunteered this myself in the conversation. The use that I envisioned for the statement was that of discouraging further harassment and badgering and annoyance, which she was complaining very bitterly about, **[241]** on the part of the investigator and the representative from the attorney's office.

I felt that if she had a copy of this, which we did leave her, and if she were to give this to Barnes, then this might dissuade him from any further activity of the kind she resented and was complaining about.

Q. So one of the purposes of this statement was to stop any investigators who were coming around and allegedly harassing her. Hopefully, she would show them this statement, and they would cease and desist? A. Exactly.

Q. All right. A. That was it, yes.

Q. And it wasn't necessarily packaged, that is, the contents weren't put together, with the thought that this is the whole, total story; it is what we want the world to know; and it is something we would present to a court of law.

That was not the purpose of that statement; was it, sir? A. Not so far as I knew, no. • • • •

[257] • • • • Q. I'm back in the home now, Mr. Humphries, on the 27th, when you were in Ms. Janowski's home.

Do you recall Mr. Allis promising Ms. Janowski that she could continue to work for the Butler firm? A. No, no promises.

Q. All right. Let me phrase it this way, in fairness to you, sir. Do you recall in the conversation at the home with Krystyna Janowski and Mr. Allis that it included an exchange

about Krys's employment relationship with the firm? A. Yes, sir.

Q. And did Mr. Allis suggest that if she wished, she could continue work at home, even though the baby might be there, in order for her to stay working and make money? A. Yes.

Q. The suggestion was made by Nick that tapes could be brought to the house. She said, "Well, I'll need a tape **[258]** recorder."

Do you recall that being said? A. Yes, sir.

Q. "And we"—meaning you and Allis and Janowski—"discussed the logistics of getting a typewriter into her house and her using it there"? A. Correct.

Q. To your knowledge, was a typewriter ever delivered to the Janowski residence, at least by you? A. Not to my knowledge. • • • •

Q. Did you have a discussion about what had just occurred with Mr. Allis? A. A brief one, yes.

Q. And what was that discussion, if you could share it with me? What did you discuss? A. Well, the gist of it was that we felt satisfied and rather content with the way the conversation went, and I remember what I said, that I felt that she was, that evening, rather believable, and I felt that we may well have, at that **[259]** time, done enough to discourage the defense represenatives from continuing their contacts with her, and that we had established the truth of what had actually gone on, or rather, what had not gone on between her and Mrs. Koller by way of a phone conversation. • • • •

Cross Examination By Mr. Stein

[260] • • • • Q. You knew that she was comfortable with you in the past; that is, there was some sort of respect and friendship between you two before you went over there, wasn't there? A. Yes.

Q. And how did that arise? A. From an occasional encounter in the Butler office when I was doing an odd assignment for Mr. Allis. I would need an address; I would need a file; and we would exchange briefly a little conversation, and I felt—apparently she did, too—that we were friends.

Q. And with that background, you evaluated her on the evening of December 27th. A. Yes.

Q. And when you left there, you were convinced that what she had told you and what was in the statement was true? A. That's correct.

Q. And you so told Mr. Allis, didn't you? A. Yes, sir. • • • •

[261] • • • • Q. Now, you intended to tape the whole conversation, did you not? A. I certainly did.

Q. You didn't premeditatedly turn off your tape recorder to conceal any of the conversation, did you? A. Not at all, no.

Q. How is it that you didn't get the whole conversation? A. When I went to the office Monday afternoon, the 27th of December, I didn't bring my own tape recorder with me. When Nick asked me if I had my tape recorder with me, I said no. Then he said, "Go out and buy one."

Having tested a couple in the office and found them inadequate and insufficient, I went out, after calling three or four places, to try to find a Sanyo machine. The one store where some Sanyo equipment was sold did not carry the hand-held small cassette tape recorder that would have been necessary for that evening's recording. I had to settle for a demonstration model of a J-500 Craig, carrying a mini-cassette. The only cassette tapes available were the ones with that machine. It was a demonstrater. They had a couple. I could have gotten more than the one, but I did not anticipate more than 40 minutes conversation. Certainly I knew that I wouldn't find justification for removing myself **[262]** from the room continuously. So, I had to settle for the 40-minute tape, 20 minutes on each side.

I couldn't find a half-an-hour tape or the kind of arrangement where I could have a two-speed and have a 30-minute or an hour on one side.

Q. Now, you went out and turned it over, correct? A. Correct.

Q. You come back inside and the tape recorder is in your pocket? A. Correct.

Q. Which pocket? A. This one right here (indicating).

Q. You are then afraid that the tape may expire and buzz; is that correct? A. That's correct.

Q. And what would have happened if the tape buzzed? A. It would have presented an embarrassing moment, because Krystyna Janowski would have heard it and might have wondered, and it might have alerted her to the fact that indeed I was recording the conversation.

Q. So, you're apprehensive that the tape may run and buzz? A. That's correct.

Q. What did you do in the face of that apprehension? A. Well, I had my eye on the clock, and a couple of **[263]** minutes before the 20-minute sector each time, I turned it off.

Q. Did Mr. Allis know when you turned it off? A. No. • • • •

• • • • Q. Why did you hedge your statement around with the words "might" and "partially"? A. Well, I didn't know whether it came from Nick or whether it came from Richard Daum, and I wasn't that sure of the completeness of what either might have said, or Nick in this instance, regarding this comment.

Q. Are you any more sure now? A. I'm sure that it might have been a gathering together of information that I have gotten since.

Now, right now I'm looking back. I remember more specifically that this point—and this point was made during Krystyna's deposition that I sat it on, the first part of it, anyway. • • • •

[264] • • • • Q. At the time you identified the signing on the tape—let me put it a different way. Can you identify on the transcript of the tape when Ms. Janowski signed the statement? A. Yes, I remember I did. I don't remember which page it was, but I remember I was able to do so when I was questioned in my deposition.

Q. There's nothing, as far as I can tell, at that point in the tape about any promises of any kind. Do you recall any

promises made to her in exchange for her signature? A. None whatsoever.

Q. Would you have participated in a statement where a promise was given? A. No sir.

Q. Why not? A. Because the statement, first, would be invalid, and, secondly, because it would be very unethical and harmful **[265]** to get a statement under those circumstances. • • • •

[266] • • • • Q. After you left Ms. Janowski's apartment on December 27th, and you felt that you had clarified something in a worthwhile way, would you have any reservations about giving that statement to someone and saying, "well, what's in this statement, it represents the truth as Ms. Janowski knows it"? A. I would have no such reservation at all. • • • •

[271] • • • • THE COURT: Okay. What was your evaluation of Ms. Janowski, since that's one of the primary purposes you were asked to go?

THE WITNESS: My evaluation was that she, that evening, was a woman relaxed, truthful, and interested very much in being rid and free of the whole question and being **[272]** able, once she got her pay check and her vacation pay, to leave the area with her daughter, go somewhere else and have nothing more to do with either firm, any investigator from any firm, or anyone connected with the questions that were being asked her that week.

THE COURT: Well, wasn't that a little inconsistent with her later wish or someone's later statement that she could work at home on Bixel Street?

THE WITNESS: No, I think not. I think that during the evening of our discussion, she was saying a lot of rather flamboyant and exaggerated things. She was talking about going to Mexico or going to Texas, and she also was—

THE COURT: Isn't that inconsistent with calmness?

THE WITNESS: With what?

THE COURT: Calmness, C-A-L-M-N-E-S-S.

THE WITNESS: It indicated a strong desire. With us she was perfectly calm. She raised her voice a couple of times. Basically she was settled, in complete control of herself, and laughing through a lot of it, chuckling and actually enjoying many parts of it. That tape will show it.

But the other thing you asked about was this inconsistent, her wanting to go away, with considering and talking about staying—

THE COURT: And going about the business of determining where typewriters may be set up and things like **[273]** that.

THE WITNESS: Right. I think not particularly, because she also was talking about her own—her own needs, and she was very concerned about her pay check and her vacation pay. She reiterated it a couple of times.

THE COURT: Let me ask you this. To your knowledge, was her pay check overdue?

THE WITNESS: No.

THE COURT: Well, do you know why she was concerned with it, if it wasn't overdue?

THE WITNESS: I think her concern probably was that she personally wouldn't be coming in to get it, and she was going to send her friend over, and she wanted to set up as clear and definite a means of this arrangement working out.

THE COURT: Where did you get that impression from? Was it something she stated that's in the transcript?

THE WITNESS: Yes, ma'am.

THE COURT: And what did she state that led you to believe she was not coming into the office any more?

THE WITNESS: No, no, not any more, but that Friday, I think she probably would be feeding her child and pay checks would be ready at the end of the afternoon, and Luis Castillo would be asked to come over and pick up the check. She was going to come in later, the next week, and show her **[274]** baby around. That's another thing she did say. • • • •

[276] • • • • THE COURT: But you also left there with the impression that she would continue on the payroll because a typewriter or other equipment would be brought to her house for her to work?

THE WITNESS: If it were to be brought, then she would be paid for that work. That was what I understood.

THE COURT: But did you understand that the typewriter or whatever the equipment was would indeed be brought to her house?

THE WITNESS: No.

THE COURT: Well, do you know why you went into all **[277]** of the discussion about where to set up such a typewriter if there wasn't a definite plan to take work to her at home?

THE WITNESS: Because everything was very much up in the air at that time. This was a proposal and a reassurance together that if she wished, she would be able to continue on working in this fashion.

THE COURT: Who made the proposal?

THE WITNESS: Nick Allis.

THE COURT: And this was after the statement was signed?

THE WITNESS: Yes, that's true.

THE COURT: And after the tape was off?

THE WITNESS: Yes, ma'am. • • • •

[280] • • • • THE WITNESS: My frame of mind was that she might well have said that she had had a conversaiton or that she might have—not that she had said it to Barnes and/or the attorney, but rather that she might have said so by telephone, which would have prompted, perhaps, the follow-up by the investigator in Los Angeles. • • • •

[282] • • • • THE COURT: Did you, Mr. Humphries—did you personally try to determine before she was asked to sign this "retraction" or "affirmation" the truth or falsity of whatever you were trying to get?

THE WITNESS: Yes, indeed. • • • •

[290] • • • • THE COURT: All right. And do you recall about what time of day that was on Monday?

THE WITNESS: It was in the afternoon. I'm not sure exactly what time of day. The reason I'm not sure of the time is I worked Sunday night 11 to 7, so I was sleeping during the day. So, he woke me up when he called, and I'm not sure—you know, when I'm—it's like being woke up in the middle of the night. You don't have a real clear time frame of things. • • • •

Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 11, 1983

JAMES G. BUTLER, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination By Mr. Cohen

[301] • • • • Q. When you called him back about 9:30 p.m., was it, on Sunday, what did he tell you? A. Well, it's hard for me to reconstruct everything that he told me. I've read memos and things of that sort. So, as best as I can remember, he told me basically that Krystyna had called him at the office on Sunday afternoon and told him a story about somebody approaching her in the parking lot of the hospital and urging her to call Davis Polk & Wardwell. And then she went on further to say that they wanted her to sign a statement that Mrs. Koller didn't take Bendectin during the first trimester.

As I recall, he also said something about Mr. Barnes and Mr. Ryan coming to call on her at home. And then there was some discussion about her seeing some independent counsel, and I was not clear, because I think that they mentioned or he mentioned the fact that maybe they were **[302]** talking about some criminal record of Krystyna's, and they talked about a defense lawyer, and I didn't understand whether they meant a lawyer for something involving some alleged criminal violation or what it was.

And then she mentioned something about the fact that they had plans for the office and knew where our computer was and—generally it sounded to me, whatever it was, and I think it's reflected in his memorandum that he subsequently prepared—generally I had the idea that it was a bizarre story. It didn't make sense to me. * * * *

[305] * * * * Q. And what did you say to Mr. Daum after he relayed this to you? A. Well, I said, "I think that she's flipped or that she's crazy." * * * *

[306] * * * * A. No. I thought that Krys was bizarre.

Q. You thought that she was bizarre even during the course of her employment with the Butler firm?

A. Correct.

[334] * * * * Q. You knew Carl Schuck's name? A. That's right.

Q. Did you know that he was an attorney, licensed to practice in the State of California? A. Yes.

Q. Did you know that he was with the firm of Overton, Lyman & Prince? A. Yes.

Q. Is that a reputable firm in the State of California and the City of Los Angeles? A. Yes.

Q. Is Carl Schuck a fellow of the American College of **[335]** Trial Lawyers, to your knowledge? A. I didn't know that at that point.

Q. All right. Is Carl Schuck, based on your knowledge of him on December 27, 1982, a reputable attorney in your city? A. Yes. * * * *

Q. * * * * Had you ever personally met Carl Schuck prior to December 27, 1982? A. In 1948 when I left Washington, D.C. after graduating from Georgetown, I had a letter of reference to Carl Schuck and had lunch with him before I got admitted to the bar in California.

Q. Is that the last personal contact you've ever had with Carl Schuck? A. That was the last personal contact.

Q. Does your firm and Carl Schuck's firm come into contact via an adversarial process of litigation? A. Frequently.

Q. So, you are very familiar with his name as a litigator; is that not correct? A. Well, it wasn't—no, I was not. Carl was

in an entirely different portion of the Overton firm than the portion I was dealing with. * * * *

[341] * * * * Q. What had led you to believe at this point in time that Janowski was not telling the truth? A. Well, because I believed utterly and sincerely in the veracity of Mrs. Koller and our litigation, and I knew that whatever she was doing was—seemed contrary to the basic belief that I had, that the malformations in this case were caused by the defendant's actions and that Mrs. Koller is telling the truth and that this is a responsible and important piece of litigation.

Q. So, you were aware at that time that Janowski had called Davis Polk and advised them that Mrs. Koller had not **[342]** taken Bendectin during the first trimester? A. At that point in time I was not aware of that fact.

Q. Well, your prior answer, and I may have misunderstood it, seemed to indicate that you were, but you're saying that was not a good inference to be drawn from that? A. The inference of what they were trying to do, according to Krystyna Janowski—you have to understand that I did not have any great faith in Krystyna Janowski's story, and yet here was an attempt or an apparent attempt to try to get a secretary in our office to sign a statement regarding the ingestion of Bendectin. And, so, based on my belief in Mrs. Koller's veracity, it seemed so bizarre and so unusual and yet I knew that the stakes were very, very large as far as the drug company was concerned, and I didn't know what they were capable of. * * * *

[365] * * * * Q. What did you say? A. Well, I tended to believe that she probably had called Davis, Polk. But I still couldn't put it in its direct context.

I think Nick wanted to believe Krystyna, and I tended not to believe her.

And yet, we didn't know for sure.

I know that he had told her to come to the office and to make a statement, and I know that she did not come to the office and make a statement.

Q. What would be the purpose of coming to the office and making a statement if you already had her statement to Daum, you already had her statement to Allis?

Why did she need to come into the office and repeat it for the third time? A. I wanted to see her verify. All we had so far was **[366]** conversation and talk.

I wanted her to verify whatever she was saying because I believed that she was a very dicey kind of a person.

Q. So the purpose that you and Allis discussed of a statement and her coming into the office was merely to set out the facts of what had occurred for your verification; is that correct? A. For the verification for whatever purpose in the future, because here was a situation that I had never faced before, and I don't think many other people have. And I wanted to get something in writing—what is this about? • • • •

[376] • • • • Q. • • • • Did you decide to do anything else after receiving that information from Mr. Allis? A. Yes.

Q. Could you share that, please? A. Well, I felt basically that Nick had to clear it up.

Q. What do you mean by clear it up? A. Nick had to handle the situation at this point.

Q. What do you mean by handle the situation? A. I thought that it was important that we get some statement in a form that could be used as to what had happened.

Q. Well, didn't you already know what had happened? A. I didn't know what had happened anymore than anybody else knew what had happened who wasn't there with Ms. Janowski.

Q. Would the statement have enabled you to know what had happened as you've described it, or would it not just be a written recapitulation of two oral statements? A. No.

I thought it was important to establish what was **[377]** the central issue during that day, as far as I could see, and that was, was this woman really saying that Mrs. Koller did not ingest her Bendectin at the time that she said she ingested it.

And I thought that that was the important fact, that the alleged activities of Barnes was to try to get her to sign a statement that she—she, Mrs. Koller—had stated that she had not ingested Bendectin.

And I thought it was very, very important, if this was what the thrust was about, to get a statement from Krystyna Janowski that that was incorrect or correct—whatever it was, that she had to sign a statement to that effect because that seemed to me to be the central issue of what was going on.

Q. So you weren't concerned about, in terms of priority, about the bribery or anything else.

Your primary concern, would it be fair for me to state, was the economic well-being of your litigation? A. Not at all. Not at all.

Q. You were concerned that you needed a statement from Janowski denying that Koller had said that she had not taken Bendectin in the first trimester; didn't you, sir? A. No.

I had to determine the facts of what Ms. Janowski was trying to say, and what she was trying to say was **[378]** evidently that Mrs. Koller had not taken Bendectin during the first trimester.

That was central to the investigation of what everything was about, about Mrs. Janowski being offered a bribe or a relocation, or all of that other stuff.

Q. Was your prime purpose in getting a statement—was to effectuate or to obtain a retraction or a refutation of any inference that Mrs. Kolier did not take Bendectin in the first trimester? A. No. • • • •

[393] • • • • Q. And everyone felt that the plan to find out the truth should be to consult with Miss Janowski a third time? A. It was to try to get something in writing to affirm what she was saying: that she had no such conversation.

Q. Well, I thought that the issue that you were trying to sort out was not whether she had any such conversation, but whether there was an attempted bribe, fraud on the court, and subornation of perjury, by the representatives of the defendant? A. We were trying to determine the correctness of the story that she was telling us: was part of it true? Was any part of it true? Was all of it true? What was the statement? What was it about? **[397]** • • • • A. I could be mistaken about the Rolodex card, but I am sure that I told him about

the fact that there was an attorney out to see Krystyna Janowski, and Krystyna Janowski identified him with the Davis, Polk firm, rather than being an independent lawyer.

Q. All right. • • • • **[398]** • • • • A. I don't recall that, but I just said that we thought it was appropriate to get a simple statement from her, whether the conversation had taken place or not.

Q. All right. A. Because I think, by that time, from some source, I had heard that it was supposed to have taken place the day that Mrs. Koller came into the office for the Falk appointment. • • • •

[400] • • • • A. Yes. Later in the afternoon I suggested that he go on out and see her.

Q. All right. A. And get a statement.

Q. And get a statement? A. Yes.

Q. And what did he say, if anything? A. He said he thought he should take a witness, and he suggested Richard Daum.

And I said: No, I don't think that Richard is constitutionally strong in order to handle the kind of confrontation which was involved. • • • •

[404] • • • • A. My recollection is that Allen Eaton called me from Washington, D. C., sometime around 6:00 o'clock in the morning and read to me a copy of the letter that he had in his office from Davis, Polk, and Wardwell. • • • •

[405] • • • • Q. Do you recall that the letter indicated that Davis, Polk had gotten a call from Miss Janowski— A. Yes.

Q. (continuing)—and she advised the defendants that Mrs. Koller had not taken Bendectin during the first trimester, or words to that effect? A. I think so. I would like to see the letter.

Q. All right. A. But I believe that that is what it said.

Q. All right. I am trying to get your recollection of it.

What I am trying to find out from you, sir, is this: Was this the first time that you were aware that Krystyna Janowski had called the defendants? A. Yes.

Q. So your statement—you had made no statements to anyone else, including your client, or to Mr. Eaton, that

Krystyna Janowski had called Davis, Polk and told them that Mrs. Koller did not take Bendectin in the first trimester, until you received that information in a letter from Davis, Polk on December 28th; is that correct? A. I believe that is correct. • • • •

[410] • • • • Q. What did you say to Mr. Allis? A. Well, I said—we went over the substance of the letter, and the first thing was that there was some statement that a receptionist had taken a 'phone call from someone who identified herself as the secretary to Mr. Allis, and, of course, that could only have been Krystyna Janowski.

So we tried to put that in the context of the things that had happened the day before and— • • • •

Q. • • • • I am not sure I understand what you mean you were trying to put into place. A. Well, because there was no verification, and we had no knowledge up to this point that Krystyna had called the New York office on December 22, 1982. That was not information that we had up to that point. • • • •

[416] • • • • Q. • • • • On Monday, when you were trying to get to the bottom of it, you had his name involved in bribery and fraud.

On Tuesday, you, all of a sudden, because of this letter, seek him out. It was Tuesday, was it not, sir, when you called? A. It was Tuesday, but I did not have Mr. Schuck **[417]** involved with bribery and fraud.

Q. Correct me if I am wrong, sir. You were trying to get to the bottom of what was occurring in the Janowski matter on Sunday evening, the 26th, 1982; on Monday morning, the 27th, 1982; on Monday afternoon, the 27th, 1982, in December; and on Monday evening, December 27th, 1982; is that not correct? A. That's correct.

Q. All right.

And, in doing that, you talked to Janowski, you, personally, once on the 'phone; Allis, once on the 'phone.

You went to see Janowski, or Allis did, once at the hospital. He went to her home with Humphries.

All of that, that evening with one person; is that not correct, Mr. Butler? A. With one purpose? No.

Q. With one person, Janowski. A. Yes, but Janowski was still our employee.

Q. I see.

But at no time—at no time while you were doing this, ostensibly to get to the bottom, did you call another person, who, you believed, was not involved in this, to find out how it was that their name was associated with your employee. You did not do that? A. Yes, but our employee had told us that she was **[418]** not represented by Mr. Schuck.

Q. I am not talking about representation now, sir. I am talking about getting to the bottom, as you keep saying.

A. Well, I thought the first place to go was to Krystyna Janowski; not to Mr. Schuck. • • • • Q. • • • • **[419]** • • • • Were you trying to get to the bottom of whether there were fraud and bribery being committed, or were you trying to get to the bottom of whether Koller did or did not take Bendectin?

What was it that you were going to get to the bottom of? A. I did not see that they were inapposite. I felt that what I had to do was to find out what Krystyna Janowski really was saying, and I thought the best way to do that was to take Mr. Allis, a man whom she respected, if not had a more than high regard for, and have him talk to her and tell her to tell the truth, whatever the truth might be, wherever it might lead, and to try to get that in a form that someone would be ready to accept.

I, also, felt that if I had called the court, or somebody else, and tried to make some representations as to what Krystyna Janowski's statement was, that I would be acting recklessly and without due regard for all of the people who were involved.

Q. All right.

And you felt like that on the evening of the 27th? A. That is correct. • • • •

[434] • • • • A. • • • • I think I had a duty to notify the court if I thought that Krystyna Janowski had called them. But

whether it was grossly improper not to have done so, I don't know. • • • •

A. Well, it is—I think what I was asking was for the court to have a full investigation into the circumstances.

I think that I acted fairly and judiciously and honestly with the court, and I don't—and I don't know whether it would have been grossly improper to have not notified the court, if I knew it.

But I never did know it. I did not know it. • • • •

[437] • • • •? A. Well, I was of two states of mind on Monday. I didn't know what to believe. I didn't know what to believe.

And so I was just simply reciting this. Mr. Allis tended to believe Krystyna Janowski was telling the truth, and that all of these things were true.

I, perhaps, was more cynical than Mr. Allis, but I just simply wanted to recite the facts and try to dig into it and figure out what was the proper thing to do.

Q. Well, my question to you, sir, was: • • • •

[439] • • • • Q. • • • • And all I am saying is that the information that Daum gave you, all of it was not included in this paragraph? A. I don't want to argue with you, but I had a page and a quarter of a letter from Davis, Polk. And I didn't think that this was a pleading. I thought it was trying to set forth fairly what I knew as of that period of time, without going into exquisite detail.

I asked for a hearing to advise your honor of the complete circumstances as to what has occurred, and the facts as we understand them.

I was not trying to set forth in detail everything that took place. • • • •

[446] • • • • Q. • • • • Obviously, if you had knowledge that she had called them, then it would have been an entirely different situation and you would not have objected like this, I assume? A. Oh, I think that until the thing was sorted out, they should not have approached my employee. She was still my employee.

Q. So even if you had knowledge that she had contacted them, you don't think that they should have done anything about that contact? A. Absolutely not. I think it was improper for them to do so.

Q. But you are testifying that you never gained that knowledge until December 28th? A. That is right.

Q. When the letter of December 27th arrived? A. That's right.

Q. Did anyone in your organization have that knowledge sir, to your knowledge? A. Have the knowledge? No.

• • • •

Cross Examination By Mr. Stein

[454] • • • • Q. You said at one point that you were of two states of mind, and you said: "I was more cynical."

What were your two states of mind, with respect to **[455]** the information that you had been given by these various people concerning Miss Janowski? A. Well, we had this story.

Q. What was the story, as you understood it? A. Well, the story about the mysterious stranger and the story about Barnes coming to call on her and the story to relocate her and the story of her wanting to sign a statement—of them wanting her to sign a statement saying that Mrs. Koller did not take Bendectin during that period of time.

And, on the other side of it, I had kind of an underlying disbelief in her, because I knew that she had this kind of affection for Mr. Allis. And I just didn't know whether what she was saying was true, or the opposite was true.

Q. What would be the opposite? A. The opposite would be that all of this didn't happen exactly this way, and that maybe she had signed some kind of a statement that Mrs. Koller had told her that she did not take Bendectin.

Q. What would be the basis for drawing that conclusion? A. I guess the underlying—my lack of confidence in Krystyna Janowski.

Q. Why would that have led to the conclusion that you just identified? A. Well, there was the possibility that maybe she

[455/A] had signed such a statement. I didn't know. And I just did not trust Krystyna Janowski, basically.

Q. Did you believe that people would come out to her house, without any initiation by her, to solicit a statement from her? Did you believe that? A. I thought it was highly unlikely.

Q. Did you express that view? A. I expressed it to Mr. Allis and I expressed it to others.

Q. Why did you think it was highly unlikely? A. Well, it was just that in 35 years of practice, I had never seen such a thing or heard of such a thing.

Q. Did you give your reasons why you thought it was unlikely to Mr. Allis? A. I think I did. It was very hard to talk to Mr. Allis. He felt very, very affronted, very distrubed, by what had happened. And I think that he wanted to believe Krystyna's story.

And so, being my partner, I wanted to give him full expression of what was being said and what was being done.

And when he came back from seeing her, I think that he was more convinced of what she was saying than I was.

Q. If what she was saying were true, as I have been able to gather it in this proceeding, if what she was saying were true, it would be that people from Davis, Polk, **[455/B]** or people connected with them, or people connected with their client, had come to her and asked her to sign a statement that Mrs. Koller did not ingest Bendectin. Is that what you understood her story was? A. That is what I understood to be the whole thrust of what was happening.

Q. A cynical reaction to that, I take it, would be that, as a matter of fact, she had done precisely what she said that she had not done: that is, that she had told them that Mrs. Koller had not ingested Bendectin? A. That is correct, and that thought certainly crossed my mind.

Q. Did you present that point of view in discussions with your partners? A. I am positive that I did. • • • •

Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 14, 1983

JAMES G. BUTLER, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

[524] • • • • THE COURT: But now you have testified here during this proceeding that on the 27th, you thought she was suffering from postpartum blues; you thought she was crazy; **[525]** you've told me today you thought she had deep psychological problems; you've also told me today that you thought she was an explosive personality before December 27th; isn't that correct?

THE WITNESS: Those were considerations I gave, Your Honor, yes.

THE COURT: Now, given the condition you believe Ms. Janowski was in, how could you in good faith have permitted Mr. Allis to take a statement out there that says, "Today I feel calm and my mind is free and clear"?

THE WITNESS: Because that's what Mr. Allis said that she said and how she was in the afternoon when he talked to her—that morning at 10 o'clock.

THE COURT: That she said that her mind was free and clear?

THE WITNESS: She said that she was clear and she appeared clear at that particular period of time.

THE COURT: And you were willing to have her sign that statement, notwithstanding your concerns about her being crazy, her suffering from postpartum blues, and the deep psychological problems that she had, and the fact that she might have been pathological?

THE WITNESS: All I wanted her to do was to sign a statement which accurately reflected the truth as she knew it. That's all we wanted to do, and that is the truth, Your **[526]** Honor. That is the truth in that statement.

THE COURT: Why would you fear a confrontation if you felt that her mind was free and clear and that she was calm on the 27th?

THE WITNESS: Your Honor, I think you're taking words out of context.

THE COURT: I don't think so, Mr. Butler. I listened to your testimony with great care.

THE WITNESS: I can understand that, Your Honor, but I—I felt that when Mr. Allis and Mr. Humphries were going to go out there, they were going to confirm the things that she had already told Richard Daum and she had already told Mr. Allis, period. • • • •

[529] • • • • THE WITNESS: Well, I felt absolutely that there wans't any possible chance of Mrs. Koller ever having said to her that she didn't take Bendectin during the first trimester, because that was completely contrary to the medical records as I know them, that there was—

THE COURT: Well, contrary to the medical records. Who says the medical records are true, all right? • • • • **[540]** THE COURT: Well, induced or otherwise, the question is, had she made a call to Davis Polk, you were fully aware of that?

THE WITNESS: Again, Your Honor, what is knowledge? I did not know that she had made a phone call, but did I suspect it, absolutely I suspected it.

THE COURT: Well, you suspected it on the 27th, according to your earlier testimony.

THE WITNESS: I suspected that there was a possibility, yes, Your Honor. • • • •

Redirect Examination By Mr. Cohen

[557] • • • • Q. Well, the query is, sir, though, that you attached that statement in a letter to the Court and you did then mention the $15,000 bribe in your letter; is that not correct? A. I mentioned that we also have learned that she stated—meaning Krystyna Janowski—that she had been offered $15,000 to sign such a statement. That's what I told the Court. I didn't—I said only that, and that's all we knew about it.

Q. And I'll leave this issue alone. I don't mean to badger you, Mr. Butler.

The only point I'm making is that on the 28th when you told that to the Court, you had no additional knowledge than existed—than you had on the 27th when the Janowski statement was taken? A. Nothing more additional that I know of. • • • •

[593] • • • • Q. Now, if I can direct your attention to page 3 of Defendant's Exhibit 13— A. Yes.

Q. (continuing)—which is entitled "Third Contact," do you have that point there, sir? A. Yes.

Q. All right. And it reads:

"Barnes and Ryan offered to send an attorney to her on Friday at 8:00 or 9:00 o'clock. A man with gray hair, over six-feet tall, broad shoulders, 60 to 65 years old, and wearing a gray suit, arrived at her apartment, as stated. He was uncomfortable that Luis was there and didn't want to talk. He identified himself as Carl Schuck of Overton, Lyman, and Prince. He told her not to be afraid of Jim Butler. Carl knew Jim from the Paris **[594]** air-crash litigation. He stated he did not want to do what he was doing. He felt it was unethical, but had a favor to repay. He saw his role as just giving some counsel. Apparently, he read from the evidence code.

"Krys and Carl agreed to meet at his office at 10:30 a.m., Tuesday, December 28, 1982.

"He wrote his name and address and appointment time on a card. We have this. As he left the apartment, he found a business card and returned to give that to Krys. We have this."

Now, did I read that accurately, sir? A. Yes.

Q. And is that a true statement of what Miss Janowski related to you? A. Yes, that is my impression of what she related to me. • • • •

[636] Q. • • • • Who gave you the statement to look at? A. I don't recall that anybody gave it to me. I recall somebody walking by with it, and I kind of took it to look at it.

Q. Was it being generally passed around the firm for people to look at and comment upon, if they so desired?

A. No.

Q. All right.

THE COURT: Since nobody gave it to you, from whom did you take it?

THE WITNESS: I don't recall. If you—

THE COURT: There are only—

THE WITNESS: If You—

THE COURT: Excuse me. There are only "x" **[637]** number of employees at the Butler firm.

THE WITNESS: Yes.

THE COURT: You say you took it from somebody in the lobby. Now, by a process of elimination, tell me from whom you took it.

THE WITNESS: That doesn't mean that I recall who I took it from.

THE COURT: I can't believe that you don't recall from whom you took it. There are only 10 or 15 employees in the Butler firm. This isn't like Times Square. This isn't Times Square we are dealing with.

You know every employee at the Butler firm; you take a document from somebody's hands to read; and you can't recall three months later from whom you took the document?

THE WITNESS: That's correct.

THE COURT: Very well. He can't recall. • • • •

Excerpts from United States District Court for the District of Columbia Evidentiary Hearing Transcript of March 15, 1983

NICHOLAS R. ALLIS, called as a witness by the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Cohen

[758] • • • • Q. Mr. Allis, did Ms. Janowski ever give you a business card of Carl Schuck's? A. I think she did, yes.

Q. Can you tell us when she gave that to you? A. I think that she gave it—assuming she gave it to me, and, as I said, I think she did, it was in the hospital. • • • •

[770] * * * * A. I don't recall, but the previous afternoon, in **[771]** discussing the possibilities, one possibility or even a probability was that she had at some point in time led Barnes or the defendants on by saying something. This could have been in a telephone conversation or at some other time. She had in the hospital—by the time I left the hospital, I thought that she had made a telephone call after initially being contacted by Barnes and his—the people with him, but she always specifically denied—and I hope I don't have to keep repeating this—specifically denied that she said anything to the other side about Mrs. Koller not taking Bendectin at any time or any other such thing.

Q. My question to you, sir, was two-fold. On the 27th, did Janowski tell you that she had called Davis Polk & Wardwell after they had made an initial contact with her? A. She said that to us in the evening, to the best of my recollection, and this—that's correct.

Q. And the further question is, on December 28th in the morning when you were reporting to Butler, did you tell him that? A. I do not recall, because it would not have been particularly important information, because by the afternoon of the day before, before going to her apartment, we had already thought that there was a possibility, or even a probability, that she had contacted the defendant and led them on—and, in addition, led them on in some way, and **[772]** that's why I mentioned to you what was my belief about the telephone call by the time I left the hospital.

So, the fact that she told us that that evening would not have been particularly important information just confirming—confirming a fact. She called Davis Polk after being contacted by the other side, and I don't really recall just exactly when she said that, but I'm pretty sure she did tell us that again.

Q. On the 27th? A. At her apartment.

Q. Yes, and that was the 27th. A. It was the 27th in the evening, yes.

Q. Now, you didn't feel that the confirmation of a suspicion that you had was important information? Is that your

testimony? A. Well, I suppose everything that she said on Tuesday—on Monday evening was important, but as far as what's most important, the important things were that she said that they were trying to get her to sign a false statement and that they had offered her things for this, and that this false statement contained information to the effect that Mrs. Koller said she didn't take Bendectin or didn't take it during a certain time period or when she said she did, and that this was false. That was the important information, the very important information. And the things **[773]** after that, of course, they're all important, but it's a matter of scale, relative importance.

* * * *

[781] * * * * Q. Mr. Allis, upon Ms. Janowski telling you that information or confirming the belief and advising you that she had called Davis Polk, did you make any attempt to change the statement that you were asking her to sign? A. No. It should be reiterated that she said that she called Davis Polk after being initially contacted by defendant. She may have told us that after—you know, at the very end. It certainly is not significant to me, considering her recitation of it that it came after and that she denied—always denied—telling Davis Polk that Mrs. Koller hadn't taken Bendectin or anything of that sort. So— * * * *

[782] * * * * Q. Now, at the time you and Mr. Humphries arrived at Ms. Janowski's on the evening of the 27th, Exhibit 2 had already been prepared by Ms. Janowski, with the exception of the last four lines on the exhibit that state, "The above conversation is the only one they want me to recall having"; is that correct? A. "Is the one." There's no "only" there.

Q. "Is the one they want me to recall having."

Is that correct, that that wasn't on there at the time you arrived at the house? A. That's right.

Q. Now, who suggested that that be added, sir? A. Well, I think I suggested that she indicate on the piece of paper somewhere what it was. She chose this wording. I never suggested the wording at all. I just suggested, **[783]** "You've given me a piece of paper. Perhaps it would be a good idea to indicate somewhere on this piece of paper exactly what it is."

So, she thought for a moment and drew a line and wrote, "The above 'conversation' is the one they want me to 'recall' having."

Q. Did you ask her to explain who "they" were, or was that satisfactory in terms of your request that she indicate what this was? A. This goes with the statement that she signed, and it's very clear on the statement that the "they" are George Barnes and Associates. * * * *

[784] * * * *

THE COURT: Please do. Thank you.

I am going to focus now on the second sentence in that statement: "Today I feel calm and my mind is free and clear."

Why did you add that sentence to this statement?

THE WITNESS: I did not want her signing a statement if she felt completely unbalanced and unable to think **[785]** clearly. I put it in there because that was my impression of her at the hospital. That's why I wrote that. In fact, I was amazed at how on top of things and almost excited about the whole affair she seemed to be.

It seemed to me, she seemed to be almost inappropriately calm and descriptive—descriptive about all of the events that were happening to her.

So, I felt that she was calm and her mind was free and clear, but if her mind was not calm and her mind was not free and clear, I certainly would have wanted her to indicate it, and I put it in there so that she could look at it and see if this was something that she wanted to sign.

When she went through this correcting it, she crossed out one word in the statement, the word "feeling". She underlined the word "great", and I assume that if she wasn't feeling calm and her mind was not free and clear, she would have likewise felt very much at ease in crossing that line out.

THE COURT: Let's look at the sentence following where you said she underlined "great". That sentence also reads: "At the present time, my mind is free and clear and everything in this statement is true and correct."

Why the repetition of "my mind is free and clear"?

THE WITNESS: Because this was a very hurried statement. I think I even dictated this standing up, into my **[786]** machine. This was a very simple, hurried statement, only containing the bottom line things that she told me in the hospital, and I thought it was important to have in there what her mental state was, and I probably forgot that I had already said it by the time I got down to dictating that sentence that you've just indicated. I just said it over again.

If I'd gotten that statement and gone over it and drafted it and so forth, I wouldn't have put it in, because it's a repetition.

THE COURT: Did you testify earlier in this hearing that you found Ms. Janowski to be somewhat unbalanced and somewhat hostile in the hospital?

THE WITNESS: No, I did not testify to that. At the hospital, she said that she had some hostilities towards the law firm. She didn't say, "I have hostilities towards the law firm," but she indicated that and said specifically that she was upset or angry about the parking, and she told me about that problem, that her parking had been taken away from her in the fall, something I didn't know.

She also told me one other anger or hostility she had towards the firm. I think it was the raise business or else it was the vacation, that she had gone in to Michael Dan the week before and asked for her vacation—to be able to take a vacation earlier, and according to her, he had said, **[787]** don't take it until after this Koller case starts, and that kind of thing.

As far as her being unbalanced, I didn't say that she was unbalanced at the hospital. In fact, as I say, I was—it seemed to me that she was inappropriately relaxed and almost enjoying the situation.

In the affidavit I filled out within two days of that hospital visit, I said—and I remember it because it just struck me so odd—she said once or twice that this is like—"Gee, this is like a James Bond mystery figuring out what happened here."

THE COURT: And if I am hearing you correctly now, what you're saying to me is that if anything, her behavior at the hospital appeared inappropriate rather than appropriate?

THE WITNESS: She seemed very relaxed at the hospital and very chatty. In my mind, it seemed a little inappropriate for her to be so relaxed and so chatty, in view of this horrible series of events she was describing to me, that they were out day and night bribing and threatening her and so forth and so on.

But I assumed—I thought, here's a very strong woman, just the way I always thought, a diamond in the rough, up from the slums of Chicago, able to just get on top of everything.

THE COURT: Let me ask you, Mr. Allis, you spent close to 50 minutes at her home that night on the 27th, **[788]** evening, night, whatever the case may be. Would you consider that any of her behavior while you were there may have been flamboyant or any of her statements exaggerated, that she might have been anything other than calm, clear in mind?

THE WITNESS: Yes. She talks—she tends to use flamboyant—a flamboyant method of talking, but that's not unusual and did not mean to me that her mind was not free and clear.

The only thing I can say about the flamboyant conversation is what would be in the transcript. If I was directed to look at the transcript now, I could pick out the type of words that I mean to refer to her way of talking. But it wasn't anything unusual.

Again, she was very friendly, very chatty, on top of everything.

THE COURT: Did you note any statements that you might have deemed exaggerated?

THE WITNESS: I can't recall, but if you want me to look at the transcript, I would be glad to.

THE COURT: Your recall is enough.

Now, the way I understand your testimony, not the testimony in the case but your testimony, and that's what I'm trying to get at, all day on the 27th prior to arriving at her home, you had no reason to know that she had talked to Davis Polk; is that correct?

[789] THE WITNESS: That is not correct.

THE COURT: All right. Then tell me—you did have reason to know it?

THE WITNESS: Your Honor, I prefer just to tell you what I knew that would be relevant to that. May I?

THE COURT: If you can just answer my question, then I can proceed with the next part of my question.

THE WITNESS: A distinct possibility, perhaps even a probability, in my mind logically, which I had logically developed by the end of the afternoon, based on her statements to me at the hospital, was that she had made a telephone call to Davis Polk at some point in time.

Now, she said—she always said that this telephone call was after she was initially contacted, and my understanding was, in other words, they had threatened her or offered her things, and then she had made some sort of a telephone call.

Now, she denied, always denied, saying anything in a telephone call or any other place—she denied that she had said anything to them about the case—about Mrs. Koller not taking Bendectin or anything else that would reflect anything of that sort, you know, a fraudulent nature of the case. She denied it.

Now, by the afternoon, I thought, perhaps she said something like that under a strain or under hostility, then **[790]** her guilty conscience got to her after a few days, and she contacted our firm voluntarily, and she has embellished the thing a little bit, trying to make herself out to be a little more of a victim than she is. This is what I thought.

Perhaps she had said something to lead them on, because, otherwise it would not make any sense for a firm such as this—the opposing law firm and their investigator,

Barnes, to be out at her house day and night as she described it. That's what she was telling me, that they were out there offering her things, bribing her.

Now, why would a firm do that? We wouldn't do it to a secretary of Davis Polk. Why would they do it to my secretary? And this is the confusing part to me about what was happening.

So, I thought that there was a distinct possibility, perhaps even a probability, that at some point along the way she had told them something of that nature.

But I want to reiterate, Your Honor, that in my mind, it would have been a lie that she told them to lead them on. It wouldn't have been the truth. It would have been just something she said because she was hostile, or mentally unbalanced, or whatever the reason, that she had told a little white lie to kick us in the pants for some reason. And then they came out to her and she got very upset about the whole thing. "This is blown way out of proportion," **[791]** she's thinking to herself. "I'd better set the record straight. I'll call up the firm and tell them what I did." And then when she did call us up, she was too embarrassed to admit what she had done. But what she had done was not tell them the truth. It was to tell them a little white lie to get back at us in some way for some imagined wrong.

THE COURT: Well, let me ask you, Mr. Allis, would I be incorrect in saying that what you are saying is that you surmised that there had been a call, but you had no evidence of a call; is that correct?

THE WITNESS: Your Honor, it's very important to separate out the call and what was said in the call.

THE COURT: Well, no, you see, I'm not concerned about the content of the call. I'm not at all concerned about the content of any call.

THE WITNESS: Okay.

THE COURT: My initial question to you on this was whether or not you knew on December 27th, prior to

going to her home—prior to going to her home—whether or not you had any reasonable grounds to believe—

THE WITNESS: I did.

THE COURT: —and your reasonable grounds to believe, you say, are the circumstances surrounding her contact with your firm and the circumstances that she told you about?

[792] • • • • THE WITNESS: There's three parts to it: Did she make a telephone call? If so, what did she say? If she made a telephone call, when was it? Did she initiate the conversation?

Those three things are very important. Now, at the hospital, she led me to believe that she'd made a telephone call. Today sitting here, I can't recollect her saying, "I made a phone call." But in an affidavit which I wrote out within two days of it, I stated that she stated to me that she had made a telephone call after being contacted by Barnes and threatened and bribed, and she denied, always denied, saying anything in the telephone call.

I do specifically recall, even sitting here today two months later, because it was so odd, the way it was **[793]** brought up by her. It was initially brought up as a conditional kind of statement: "Well, Nick, what if I did or what if somebody did make a telephone call to Davis Polk?" and that specific question, I followed it right up: "Well, did you?" Answer: "No".

Now, we talked on for another hour. She may well have said during that hour—admitted somewhere along the line that she had made a telephone call. But the fact that she had made a telephone call wasn't particularly significant to me. Why? The reason it wasn't is she had denied any importance in any such telephone call. I didn't know whether she was saying, "They wanted me"—this is what she said—and even as I'm talking now, it's kind of coming back to me. When we were getting up to go that evening, Humphries—she said she'd made a phone call after—oh, I know what it was. She said that she had been contacted by some—pressured, whatever, threatened,

promised things to make a phone call, and it would be very lucrative to make a phone call, and all they wanted her to make a phone call for was so that they would have it on the record, for example, on their telephone record that she had made a phone call to them. Then they could say that they hadn't gone out and got her, that she had actually made a phone call to them, and not that she said anything in the phone call, but simply that she would dial the number and it would ring and somebody would answer. And **[794]** then if they went out and got a telephone record from the pay phone or at the hospital, wherever it was, or from our office, there would be a record there that she had made a telephone call.

So, it's very important what I thought about the content of the telephone call. She denied saying anything in that telephone call.

So, it wasn't that—I didn't know exactly where that fit in.

And then the other thing that was important about the phone call is she said that she had not initiated it. So then I get this information. I leave the hospital knowing—in Your Honor's words, having a reasonable belief that she made a phone call, but also leaving the hospital with her statements to me that she had not said anything in any phone call, or any other time to them, and lastly, that she had not initiated this contact; this contact was initiated by Davis Polk or by—I keep—it's Barnes that initiated the contact.

THE COURT: Well, that's all right.

THE WITNESS: So then I go back and say, "Is that—what is going on here?" So, the phone call, even though I had a reasonable belief that she made a phone call, when I came to my opinion that there was at least a distinct possibility, maybe even a probability, that she had said **[795]** something at some point in time that afternoon to lead them on, I wasn't even thinking that it was in a phone call. It might have been in one of these discussions that she had with Barnes when Barnes was at her house 24 hours a day, something of that sort.

Does that make it any clearer?

THE COURT: Well, I certainly do understand what you are doing, but, you see, I am concerned about whether you just surmised or whether you had evidence that she had made the telephone call.

THE WITNESS: And had said the case was fraudulent?

THE COURT: No, no, no. Just—

THE WITNESS: I certainly had evidence that she had made a phone call, yes. • • • •

[798] • • • • THE COURT: You interpret things differently. But did Mrs. Janowski at that time, whether truthfully or not, admit or acknowledge **[799]** having made a telephone call to Davis Polk?

THE WITNESS: To the best of my recollection, she did admit that.

Now, I don't remember if that was after we got finished the statement and her giving this. I thought—we had never really gone back and gotten on 10 o'clock Wednesday what happened, on 9 o'clock Thursday what happened. We'd never gotten anything like that, because of our efforts to make her feel comfortable, or my efforts in the hospital and Mr. Humphries' at her house.

So, I always wanted—and that's why I said it in the tape about I'd rather have a longer, more detailed statement. I always wanted at some point in time to get a detailed recitation day-by-day and hour-by-hour if possible, but Floyd wanted to go. But standing up, we did have a little conversation. I don't recall when she said that business about the telephone call, but to the best of my recollection she did say it.

But, again, she said it—yes, she said that she had been promised that it would be lucrative for her to make a telephone call. That's when I said—this is when that occurred which I mentioned before, to the best of my recollection, this business about her saying that they just wanted her to get it on the record that she'd made a telephone call to Davis Polk, and that way they could cover themselves **[800]** and talk to her. This is the way I

interpreted it. What I'm giving you is a combination of what she told us and how I interpreted it. She said that she was told it would be very lucrative for her to make a telephone call to Davis Polk. That's what she was told by their people or by Barnes or by a third person, something which I interpreted to be Barnes.

So that she had made that just to see what would happen. Again, not that she said anything about the case being fraudulent or Mrs. Koller not taking Bendectin in such a call but only that there would be something on the record.

So, the telephone call and, yes, I thought that she had made a telephone call, because she told us at the end of the conversation, but the telephone call was of no more importance to me than the conversation she had with Barnes during the 24 hours a day that he was out there. She always denied saying anything to lead him on, but I figured that perhaps in some way she might have or had. • • • •

[801] • • • • THE COURT: May I go now to that sentence in which "great" was underlined, and that sentence reads, "any conversation I had with George Barnes, Patrick Ryan or any other person from Davis Polk & Wardwell, or George Barnes and Associates, was at a time when I was extremely upset and under great emotional stress."

What is your basis for that sentence, since you wrote that sentence?

THE WITNESS: She said that George Barnes, and she also mentioned these other people, but to my recollection George Barnes was always the chief culprit—I'm talking about at the hospital when I talked with her—she said that **[802]** these people had been out at her house constantly trying to get her to sign a statement, offering her things and threatening her. So, I knew that she had had conversations with these people. They were out at her house all the time and they were apparently talking to her. So, I knew that she had conversations.

I thought that maybe she must have—I thought that she must have said something to lead them on in some way, or else why would they be spending all this money and sending all of these people out to surround her like vultures, unless she in some way had said something to lead them on.

But she specifically denied saying anything. But because I thought that she might have said something to lead them on—I wouldn't know whether it was an offhand comment or something more direct, I said—I put in there that "any conversation," because I didn't know what conversation she had had. She denied saying anything that would be unfavorable to the Koller case.

Furthermore, not only did I not know what this, what I assumed, comment or lead-on had been to anybody, I didn't know who it had been to. So, I had to include all of the different names.

And as she described it, she was being threatened; she was being offered things; they were out there 24 hours a **[803]** day. She wanted to flee to Mexico. She couldn't stand it any longer. So, I thought that she must have been—she was describing to me a situation where they had come out to her and got her at a time when she was upset and under emotional stress and increased her being upset and increased her being under emotional stress.

Added to that, I specifically recall her—and several people mentioned it to me—at the Christmas party we had, which, now in retrospect, was the day before or two days before she made these phone calls, that she was very much out of sorts, very angry looking, very depressed looking. And then added to that, by the time I got there in the evening, looking back on it, I talked to Mr. Butler, he thought that it was postpartum blues and being very depressed about her infant.

And I should emphasize—I don't know if I mentioned this—but she had told me that the doctor told her she was never going to be able to have another baby after this one, and that because this baby was so premature, it might

have some sort of damage, and she had just had the baby.

So, in my mind she was describing to me a situation where she was upset and under emotional stress when she had been—during the time that she had been talking to these people the last week and up until she contacted us, and I **[804]** must say I thought definitely that, when she crossed out the word "feeling."

"When I was feeling extremely upset," she crossed out the word "feeling" so it reads, "When I was extremely upset." To me, crossing out the word "feeling" made it that much more powerful. She's saying, "I was extremely upset." And then she underlined that word "great." So, another thought I had was maybe she said something to them, and because she was under the emotional stress or feeling extremely upset, had the hostilities towards our firm, whatever, that she doesn't even know what she said. That was a possibility that I thought. She doesn't even know what she said to them, completely unconscious of it.

THE COURT: Would I be correct then, based upon what you have said, in my view that this was your perception of her and she later adopted it when you presented her this statement?

THE WITNESS: No. It was my perception and my interpretation of what she told me about her mental state when she was at the hospital, combined with what I knew to be her mental state from the week before when we had last seen her. And I suppose—and in addition to that was my own presumptions and assumptions based on what the kind of events that she was describing would do to anybody. I'm sure that any average person would be somewhat upset if somebody came **[805]** out and threatened them and bribed them the way she said. • • • •

[809] • • • • THE COURT: Now, the first paragraph of that letter states that — and specifically the last sentence thereof states that "The message as relayed was that she refused to work on the case because it is fraudulent."

Now, that is the first time, I presume, that that information came to your attention; is that correct?

THE WITNESS: To the best of my recollection, although I understand that Allen Eaton called up Mr. Butler at about 6 o'clock or 6:30 or something our time in the morning, and he may have relayed that information, and it is possible that I was told before the letter actually was delivered to our office. It's possible I was told by Mr. Butler, "Allen Eaton has called me and said such and such."

Counsel pointed out some calls that I frankly don't **[810]** remember at my home. I suppose it's possible Mr. Eaton called me up and said something about Janowski, and if the conversation lasted a minute, I probably—

THE COURT: But the fact of the matter is, whether you learned it earlier on the 28th or not, at least by the time you read this letter on the 28th, that was the first day on which you became aware that the allegation was that the case was fraudulent; is that correct?

THE WITNESS: That is right.

THE COURT: Now—

THE WITNESS: Other than that she told—you know, my surmise about telling a white lie that would reflect in some way deleteriously on the case. • • • •

[811] • • • • THE COURT: Did you, Mr. Allis, make any attempt to consult with Ms. Janowski before sending this statement **[812]** and — these two statements to the court, based upon your knowledge before that letter was directed to the Court that maybe circumstances were different than you had presumed?

THE WITNESS: No, and may I tell you why I didn't? • • • •

• • • • THE WITNESS: Defendant's letter of December 27th.

THE COURT: Defendant's Exhibit 10.

THE WITNESS: It says — on the third paragraph, Mr. Lewis says, "Having confirmed this, we arranged inde-

pendent counsel so that we might advise her with respect to the law of attorney-client communications and any possible duty to the Court." And then at the very last paragraph, Mr. Lewis says, "We respectfully request a conference to prevent intrusion by any party or its counsel until the informant and her counsel have had an opportunity to evaluate the substance of her information and, if appropriate, inform the Court."

Now, really, what was in my mind that day, have I done something wrong by talking to my own secretary when she had independent counsel? That's the thing that worried me. But she had told us and led us to believe that this person Schuck was working with the defendant, and then that's **[813-836]** the reason, when we finally did see her on Friday, the first thing I asked her was: Is this fellow Schuck your attorney? And she said no.

So, she always—and I was very concerned about that. I didn't want to talk to her. * * * *

[836] * * * * At the hospital also she indicated that this person, Schuck, was simply working for the defendant.

But when I got this letter on stationery from what I believed to be a reputable law firm I assumed that they had arranged independent counsel, and this person was independent counsel.

And furthermore, they were asking the Court, and essentially saying that nobody should be talking to this woman. And I wouldn't have talked to this woman again for all the money in the world, for fear that I was doing something wrong.

And what galls me in this case, Your Honor, is that after they sent this letter to you, essentially saying that nobody should contact this woman, they went out the very day that they sent this letter and talked to her.

And they went out the very next day, on the 28th, and talked to this woman.

And then they went out the very next day, on the 29th, with a court reporter, to take a statement from this

woman—after writing to Your Honor and writing to us that nobody should be talking to her—this is my secretary.

And that's why I didn't. * * * *

[837] * * * * Now, she had told us that this fellow Schuck was somebody working with the defendants.

And I specifically remember—and that's why I put it in an affidavit to the court at one time—and she used the same word with Mr. Daum, Your Honor.

She said Schuck said to me I think I'm doing something unethical, but I have a favor to repay. And then she went on to say that he was in essence working for the **[838]** defendant.

So I didn't bother about Schuck when I talked to her on Monday.

But then, when I got a look at this very formal statement that she had so-called independent counsel, it did worry me.

Did I do something wrong yesterday by talking to my secretary? And then I decided I certainly had not. She was my secretary.

The court and the defendants hadn't told me she had independent counsel. Most importantly, she said she hadn't had independent counsel. And she said she hadn't talked to him yet. She was supposed to talk to this fellow the next day. And she made it very clear that he wasn't.

But when I got this—knowing—I'm very sorry to say this, but feeling as I do that the defendants are taking any opportunity they can to attack me and the other attorneys in this case, when I read this I was concerned.

Are they now going to say that in talking to my secretary I shouldn't have been talking to her because she had independent counsel?

Yes, I was concerned when I read that letter.

I determined that I had not done anything wrong in talking to her at all.

But I was concerned about it and I would not, after **[839]** seeing that, I did not make any attempt to go see her, and I wouldn't have.

And when finally she came into the office Friday, the lobby of the office building, I said I would not go down and talk to her because of this letter saying she had independent counsel and suggesting that no parties were talking to her, and no parties should talk to her.

And I wouldn't go down there to talk to her.

But Mr. Butler wanted me to because she was screaming about how we had kidnapped her baby. And he thought I was the appropriate person to calm her down.

So I said, I will not go down and talk to that woman unless we call up Mr. Coleman, our attorney, and he gives me permission. And I said, I want to talk to him personally on the phone and have that permission given to me.

And we called up Mr. Coleman and he gave me permission to go down and talk to her.

And when I went down there one of the first things I said was, is Mr. Schuck your attorney?

She said, no. What do I need counsel for?

And then I had just a very brief conversation with her, because I still felt uncomfortable.

And I said, if he's not your attorney, please contact Mr. Schuck, the Court and Mr. Coleman and get truly independent counsel appointed for you. And then at some point **[840]** in time I asked her, is everything in that statement that you gave me last Monday true? And she said, yes. And oh, by the way, Nick, they're pressuring me to sign a statement. They're out here twenty-four hours a day, et cetera, et cetera, et cetera.

And the other thing I did to be very careful was to have Mr. Canalez, a former FBI agent, with me, because yes, I was concerned about that letter.

And you can believe me that I was upset when I found out that almost every single day that the defendants had used this as a shield to keep us away from talking to our own secretary, in my opinion to mislead the court, and then to go out there day after day to talk to her, even with a court reporter.

That is over the line.

THE COURT: Well, let me say this. That isn't the question before the court now. * * * *

[841] * * * * THE COURT: I'm talking about the information that came to you on the 28th, before this statement was mailed to the Court.

THE WITNESS: The information. Okay.

THE COURT: Before the statement was mailed to the Court.

THE WITNESS: To the 28th letter.

I read it. And the question is did I think it was appropriate to then send our letter?

THE COURT: Yes. Her statement. Not your letter.

THE WITNESS: Absolutely. One hundred percent.

THE COURT: Okay. Why?

THE WITNESS: Why?

This is a statement that she signed, Defendant's Exhibit One, which in my opinion then and in my opinion today is true.

It has been completely confirmed. In fact, they are renting a comfortable apartment for her and her baby, **[842]** providing her with a rental car, other expenses, they did relocate her.

She did make a false statement in her deposition.

I believed then that they had been trying to get her to make a statement saying that she heard Cynthia Koller say that she did not take Bendectin. I believed everthing in this statement, absolutely.

THE COURT: Thank you.

THE WITNESS: And then this thing that she provided us simply confirmed it. * * * *

[849] * * * * Q. Could you have known on December 27th, when you left the hospital, the means by which she had made any contact with Davis, Polk? A. Could I have known?

Q. Yes. Did you know? A. I did not know any means by which she had contacted Davis, Polk, but I thought that at some point she had made some sort of a telephone call.

She denied saying anything in the telephone call. She denied that that was the first contact. It was only after threats and bribes, so—.

Q. Why did you settle on a telephone call as part of your conclusion?

Why did you think it might be a telephone call? A. She said to me in the hospital something to lead me to believe that she had made a telephone call after being initially contacted, threatened and bribed, and in such telephone conversation she denied saying anything that would **[850]** reflect badly upon the Koller case.

Q. So the sequence of events that she described to you was an initial interest by Davis, Polk in her. A. That's correct.

Q. Followed by a telephone call by her. A. This is what she led me to believe, that's correct.

Q. Okay.

You experimented with the idea that maybe the sequence was different; that is, that she had first called and then they came out to visit her. A. Or, I think ever more so, that they had initiated the contact, but in one of these conversations she had with Barnes out at her house during this twenty-hour-a-day surveillance she described, that maybe she had made some sort of an off-hand comment, and that was a possibility, too. * * * *

[859] * * * * I was informed, and tended to believe, that a couple of law firms were involved in unethical behavior with my secretary, so it would not surprise me at all to have another attorney that they have been able to convince to join with them to crush us, unethically, would join with them and do something like that.

That's definitely within the realm of possibility, and I believed it. That's what she told me.

Redirect Examination by Mr. Cohen

[862] * * * * Q. Your secretary was still on the firm payroll on December 28th; was she not, sir? A. That is correct.

Q. And your secretary was supposed to be performing work for you, as your secretary; is that not correct? A. Not in this particular situation, no.

Q. Did you have an agreement with your secretary that she would remain on the firm payroll and stay at home, and a typewriter would be sent to her home? A. No, there was no agreement.

I suggested to her when we stood up, ready to go, after she had given me the statement and after she'd given me plaintiffs' two, that along with her suggestion made to a number of people, several people, long before these events, that perhaps she could work at home, do tapes at home, a typewriter could be brought to her house.

This is what she had long wanted. It was certainly within the realm of possibility, and certainly she deserved it if in fact she was telling the truth, that she had been threatened and bribed by the defendant. In a way, if this **[863]** were true, what she was telling us, in a way she was kind of a heroine.

In addition, she spoke about wanting to go to Mexico, and I certainly felt that that was the last thing we wanted, would be for her to go to Mexico.

She had lived in Mexico for many years and spoke fluent Spanish, and I knew that it was entirely within the realm of possibility that she could take off to Mexico the next day.

And I did not want that to happen. I wanted her to remain as an employee, in a comfortable situation.

Now, she had come in sporadically since the birth of her severely premature infant, and had not at all come in every day. And I always assumed that this would continue until her infant was home and she actually took her maternity leave.

Q. Did you share that arrangement you discussed with Ms. Janowski on the evening of the 27th with Mr. Butler? A. I don't—I certainly did not discuss it—well, to the best of my recollection I had no discussion about anything like that with Mr. Butler on the 27th.

On the 28th I may have mentioned to him this idea that she's agreed to stay working with the firm, she's agreed to make out a statement, she's willing to stand up and tell the truth, she

wants to keep working to get her mind off [864] everything, because she really wants to keep working one of the possibilities is that she can do some work at home, as she is requested to do, for a number of months.

Q. And to the best of your recollection that was shared with Mr. Butler on the 28th. A. I don't recall.

It's not an important or significant piece of information because there was no agreement with Ms. Janowski with regard to that at all.

I may have told him on the 27th. I don't recall.

But I presume I probably told him by the end of the day on the 28th. But even then, I can't be a hundred percent certain.

Q. Are you through, sir? A. Yes.

Q. Did he have any objection to that arrangement, once you shared it with him? A. He voiced no objection, that I recall.

Q. Are you through, sir? A. Yes. • • • •

Order to Show Cause of the District Court
Filed April 29, 1983

FILED—Apr 29 1983—James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1258

ANNE ELISABETH KOLLER, *et al.*,

Plaintiffs,

v.

RICHARDSON-MERRELL, INC.,

Defendant.

ORDER TO SHOW CAUSE

Upon consideration of defendant's motions to impose sanctions on plaintiffs' counsel for certain incidents of alleged misconduct, plaintiffs' opposition, the accompanying memoranda of law, the argument of counsel on February 27 and March 16, 1983, the evidence adduced at the evidentiary hearing of March 9-16, 1983, and the entire record herein, it is this 29th day of April, 1983

ORDERED that counsel for plaintiffs shall show cause on May 31, 1983, at 10:00 a.m. why the law firm of Butler, Jefferson, Dan & Allis (Butler firm) should not be disqualified from further representation of plaintiffs in the above-captioned matter due to the following alleged incidents of misconduct:

1) James Butler's January 31, 1983, release of information concerning defendant's experience with Bendectin, Thalidomide, and MER-29, including fourteen drug experience reports (DERs), to the Food and Drug Administration (FDA) and the Washington Post• in an effort to prejudice the jury pool awaiting selection for the contemplated trial of this action in February or March and to bring inadmissible evidence before the jury pool in contempt of three separate evidentiary rulings previously entered by this Court;••

2) Nicholas Allis' preparing and obtaining a statement from Krystyna Janowski retracting her previous statement to defendant that the instant case was fraudulent without regard for the

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• There is no indication that the information released was informative or newsworthy since a substantial amount of the information released already was in the possession of the FDA and available to any news organization.

•• The information released included references to Thalidomide and MER-29, the DERs of the Sands and Cordova children, and fourteen DERs submitted well over a year after birth. Yet, the Court previously ruled that this information was inadmissible at trial. *See* Orders of October 19, 1982 (references to Thalidomine and MER-29), January 17, 1983 (Sands and Cordova DERs), January 31, 1983 (no DERs submitted more than one year after birth and no more than five DERs detailed).

truth of Ms. Janowski's retraction in an apparent attempt to protect the Butler firm's financial interest in this and other related matters by thwarting any further investigation into the circumstances surrounding and the basis for Ms. Janowski's original statement.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Plaintiffs' Memorandum Filed May 27, 1983 Regarding the District Court's Order To Show Cause

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United States District Court
for the District of Columbia

(Caption Omitted in Printing)

MEMORANDUM REGARDING THE COURT'S ORDER TO PLAINTIFFS TO SHOW CAUSE WHY JAMES G. BUTLER SHOULD NOT BE DISQUALIFIED AS COUNSEL FOR RELEASING THE DRUG EXPERIENCE REPORTS TO THE WASHINGTON POST AND THE FOOD AND DRUG ADMINISTRATION

• • • •

Plaintiffs herewith incorporate by reference the Affidavit of James G. Butler filed herewith. • • • •

Dated: May 26, 1983

Respectfully submitted,

BUTLER, JEFFERSON, DAN & ALLIS
By /s/ JAMES G. BUTLER
James G. Butler
816 Connecticut Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 463-0679

• • • •

(Certificate of Service Omitted in Printing)

Affidavit of James G. Butler Dated May 24, 1983 in Support of Plaintiffs' Memorandum Regarding the District Court's Order to Show Cause

(Caption Omitted in Printing)

• • • •

AFFIDAVIT OF JAMES G. BUTLER

James G. Butler, being duly sworn, hereby deposes and says:

1. I am a member of the law firm of Butler, Jefferson, Dan & Allis, attorneys for Plaintiff. I am a member of the Bar of the District of Columbia, the State of California and of various federal courts.

2. Attached herewith is a copy of my letter to the Food and Drug Administration dated January 28, 1983, which was mailed by Express Mail, together with a copy of the receipt showing that it was mailed on January 29, 1983, marked as Exhibits 1 and 1A.

3. I traveled to Washington, D.C. on Sunday, January 30th, and Tuesday, February 1, received a phone call at the River Inn

in Washington, D.C., from Morton Mintz, the reporter for the Washington Post and gave him an interview regarding the contents of the material which had been mailed to the Food and Drug Administration. These materials are very newsworthy because they show an association with Bendectin of severe Thalidomide-like effects in the children. They are particularly important because the malformations are bilateral which are extremely rare types of malformations and to my information and knowledge, no other cause has been demonstrated. I believe after extensive research that Bendectin is the cause of the malformations in most, if not all, of the children. Research necessary to compile the answer to defendant's questionnaire regarding the 14 children was started as early as October 1982 with the obtaining of the medical records and accurate information concerning the children. The authorization obtained for the release of the information to the Food and Drug Administration and the media was obtained during the month of January 1983. I never interpreted the various evidentiary orders cited by the court in the Order to Show Cause to be an order that would prevent me from communicating with the Food and Drug Administration or the press or any of the media. My discussions with Morton Mintz of the Washington Post was not intended in any way to have violated any court order made in the Koller case and was not intended in any way to influence any juror or potential juror. I was never of the belief that I was under any restraining order to prevent such material from being directed to the FDA nor did I believe I was under any gag order not to release material to the press. I believe that the Bendectin controversy is a matter of high public importance and it must be brought to the attention to the government and to the public that the continuance of this drug on the market represents high risk to pregnant mothers and to the infants in utero if exposed to doxylamine succinate.

3. With respect to the court's order to show cause as to why we should not be removed from the case, I believe that the answer why we should not be is very simple. Our office and my office of Butler, Jefferson, Dan & Allis have taken active

participation in the preparation of the case since January 1981. The court is requested to take judicial notice of the files and records and the docket sheet thereof, a copy of which will be attached herewith and marked as Exhibit 2. During the pendency of the litigation, our office actively participated in the litigation as reflected in the docket sheet and the pleadings and depositions taken therein. I or my partner, Nicholas Allis, personally sought out and interviewed all of the experts called by the plaintiff in order to determine whether the drug was teratogenic and whether it caused the malformations of Anne Koller. We have traveled across the country many times in connection with the depositions and specifically have participated in representing the plaintiffs in many depositions including the following:

Nicholas Assali, George L. Barnes, Nancy Barnes, Thomas H. Beaver, Bruce J. Brennan, Carl A. Bunde, Luis Castillo, Frederick Crescitelli, Alan K. Done, Alan M. Ezrin, Rena C. Falk, Alan Garfinkel, John Gibson, Andrew G. Hendrickx, Lester T. Hibbard, Mark T. Hoekenga, Dorsey E. Holtkamp, Ivan Husovsky, Krystyna Janowski, Herschel Jick, John Koller, Cynthia M. Koller, William L. Kuhn, Widukind Lenz, Alan C. Levy. Elizabeth Loftus, Michael Melnick, Lucille Milkovich, Bernard L. Mirkin, Thomas McCash, Leroy Neltner, James W. Newberne, Stuart A. Newman, Robert L. Podosin, Raymond C. Pogge, Emil Robert Reed, Carol Rhoads, Jackson E. Rhoads, Peter R. Roll, Patrick M. Ryan, Raymond G. Schultz, Harold C. Slavkin, Robert E. Staples, Shanna H. Swan, Johannes B. Thiersch, Mark Thoman, David Valle, Bea Van den Berg, and James G. Wilson.

We have obtained and reviewed all other depositions. I personally was present at the examination of the records of Richardson-Merrell commencing in April, May and June of 1981. Hundreds of exhibits consisting of thousands of documents have been examined, indexed and prepared for trial. From October 1982 until February 1983, our office prepared all of the documents in connection with the exhaustive pretrial preparations including listing of all exhibits, indexing of all of the depositions, preparing jury instructions, preparing memo-

randa of law in connection with the many motions, pretrial and trial and have done all of the incidental preparation for the trial. This preparation involved not only the work of myself and Mr. Allis but also the training, supervision and work of 4 to 6 paralegals, 5 of 6 secretaries and several other law members of our firm. This preparation included working every Saturday and Sunday for many months before the trial date of January 1983. In preparation for trial, it was agreed that the principal trial attorneys would be myself and Mr. Allis with the assistance of Mr. Eaton and Mr. Wiley Branton. It is my opinion that our removal from the case would severely injure the cause of the plaintiff, Anne Koller.

I ordinarily do not keep time records in connection with this or any other case involving contingent fees, but based on the knowledge that I have worked at least 80 percent of the time devoted to the law practice in the last two years, I believe that I have personally worked at least 3,500 to 4,000 hours and that Mr. Allis has worked at least 2,000 hours and that other paralegals and other people in the office worked at least another additional 1,000 hours.

I probably have more litigation and trial experience generally than any other members of the plaintiffs' team. I also am one of a handful of practitioners who have specialized in drug litigation and have had extensive trial and litigation experience involving pharmaceutical drugs. With respect to the Koller case, I probably have more knowledge of the factual and legal issues than any other counsel representing the plaintiffs and I have put this experience and preparation at the disposal of the minor plaintiff through her parents. I am of the opinion that the minor plaintiff's case will be seriously harmed if the court should see fit to remove me from the trial of the case. Also Mr. Nicholas Allis, my partner, has worked long and hard with me in this case and has achieved a special knowledge even superior to mine in connection with the various epidemiology studies that have been conducted and his presence and knowledge is necessary in the pretrial of this case. I am also of the opinion if he is removed, the child's case will be seriously damaged. I further believe that if we are removed that the court should

certify the matter for immediate appeal under 28 U.S.C. § 1292b and postpone the matter for at least a year to enable Anne and Cynthia Koller to obtain other counsel to try the lawsuit or, in the alternative, to transfer the case to the Multi-district Litigation proceedings in Ohio pending completion of those matters now pending before Judge Carl Rubin.

/s/ JAMES G. BUTLER
James G. Butler

Sworn to before me this
24th day of May 1983.

/s/ CAROL M. ASAKURA
Notary Public

OFFICIAL SEAL
Carol M. Asakura
Notary Public—California
Los Angeles County
My comm. expires Oct 28, 1983

Exhibit 1 to Affidavit of James G. Butler Dated May 24, 1983

Exhibit 1, Letter of James G. Butler to Arthur Hull Hayes, Commissioner, Food and Drug Administration Dated January 28, 1983 previously appears in the record and is reprinted at pp. 134-35, *supra*.

Exhibit 1A to Affidavit of James G. Butler Dated May 24, 1983—U.S. Post Office Express Mail Receipt

BEST AVAILABLE COPY

Defendant's Memorandum Re: The Calling of Krystyna Janowski and for an Expanded Evidentiary Hearing Filed May 27, 1983

United States District Court
District of Columbia

(Caption Omitted in Printing)

DEFENDANT'S MEMORANDUM (1) IN OPPOSITION TO PLAINTIFFS' MOTION REGARDING THE CALLING OF KRYSTYNA JANOWSKI OR OTHER WITNESSES ON BEHALF OF PLAINTIFFS OR THEIR COUNSEL ON MAY 31, 1983 OR (2), IN THE ALTERNATIVE, FOR AN EXPANDED EVIDENTIARY HEARING RELATING TO ISSUES OF FRAUD ON THE COURT

Defendant Richardson-Merrell Inc. submits this memorandum with respect to plaintiffs' May 24, 1983 motion requesting the Court to instruct defendant to produce Krystyna Janowski as a witness on May 31, 1983, the return date set in the Court's order to show cause filed April 29, 1983 regarding disqualification of plaintiffs' counsel.

Defendant opposes plaintiffs' motion. Plaintiffs' motion should be denied because

(1) plaintiffs misconstrue the Court's April 29 order: Ms. Janowski's credibility is not at issue on disqualification of plaintiffs' counsel; and

(2) plaintiffs' calling of Ms. Janowski is inexcusably untimely: they failed to call her or any witness at the evidentiary hearing held on March 10-16 despite repeated opportunities by the Court to call any witnesses they

desired. Moreover, plaintiffs had available at the hearing the six-day deposition of Ms. Janowski previously taken in Los Angeles before the Honorable Gerard D. Reilly as Special Master in January, 1983. Even though plaintiffs' counsel had cross-examined Ms. Janowski for nearly five days in that deposition, plaintiffs offered no portion of that deposition in evidence at the March hearing.

If the Court determines that Ms. Janowski should be called, defendant is, of course, willing to request Ms. Janowski, through her counsel, Carl J. Schuck, Esq., to appear at a time convenient to the Court. In that event, defendant submits that additional witnesses and evidence should be allowed and, if necessary, additional discovery. Since the time of Ms. Janowski's disclosures relating to fraud on the Court, defendant has located witnesses whose expected testimony corroborates Ms. Janowski's testimony that Mrs. Koller did not take Bendectin when she said she did.

Finally, defendant's counsel has been apprised by copy of a letter to the Court on May 26, 1983, that plaintiffs intend to call additional witnesses on May 31. Defendant opposes the calling of such witnesses as also untimely. To the extent such witnesses are being called to offer character evidence, as we understand may be the case, that evidence is inadmissible in this proceeding.

POINT I

KRYSTYNA JANOWSKI'S CREDIBILITY IS NOT AT ISSUE

Plaintiffs contend in their present motion (Points and Authorities Paras. 1-2) that the Court's April 29 order has now made the question of "whether Ms. Janowski was truthful in her [December 27, 1982] statement . . . the central issue" in this proceeding (*id.* Para. 1). Plaintiffs support this contention (1) by taking out of context the phrase in the Court's order

referring to Mr. Allis' preparation of that statement "without regard for the truth of Ms. Janowski's retraction . . . ," and (2) by pointing to the Court's general reference in its order to "the entire record herein. . . ."

These fragments are no indication that the nature of the Court's inquiry on disqualification has in any way changed. The Court made it abundantly clear that the truthfulness of Ms. Janowski was not at issue. What was at issue was the mental frame of mind of plaintiffs' counsel when Mr. Allis had Ms. Janowski sign the statement he prepared on December 27 and when Mr. Butler forwarded that statement to the Court on December 28, 1982:

> "[THE COURT:] The depositions leave me with the impression that there is something that I must be concerned about, that I must know about, that I must try to determine, not whether Krystyna Janowski is a credible witness or not, but whether or not whatever Krystyna Janowski knows or does not know plaintiffs have tried to keep from me . . . ." Transcript of March 8, 1983 at 10 (emphasis added).*

The Court's April 29 order to show cause is not at variance with the Court's prior statements. Plaintiffs' present motion

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* The Court's March 8, 1983 order scheduling the evidentiary hearing similarly phrased the issue (pp. 2-3):

> "whether any fraud has been perpetrated on the Court by any member of the firm of Butler, Jefferson, Dan & Allis or any agent or employee thereof in connection with the actions of said firm during the period December 22 through December 31, 1982 in connection with the obtaining of the [December 27] Statement of Krystyna Janowski and the submission of [the] Statement to the Court; . . ."

The March 8, 1983 transcript and the March 8, 1983 order are annexed as Exhibits A and B, respectively, to the affidavit of Ogden N. Lewis, sworn to May 27, 1983, and submitted herewith (hereafter "Lewis Aff.").

distorts the Court's clear focus. Furthermore, no portion of the evidence adduced by defendant at the evidentiary hearing rested on the truthfulness of the December 27 statement signed by Ms. Janowski. Defendant did not call Ms. Janowski nor did it offer any of her deposition testimony in evidence. Defendant's evidence rested entirely on testimony of what plaintiffs' representatives and Mrs. Koller said to each other and believed at the time and what action they took after they became aware of Ms. Janowski's disclosures.

• • • •

Excerpts from United States District Court for the District of Columbia Order to Show Cause Hearing Transcript of May 31, 1983

The Honorable FRANCIS F. VAN DUSEN, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[11] • • • • Q. Do you have an opinion, based on the considerations you have given us, concerning Mr. Allis's honesty and integrity? A. I do.

Q. And what is it? A. My opinion is that he's an exceptionally honorable person, and I say with all the earnesty that I can command that I cannot believe that this young man would do something dishonest. • • • •

JOHN K. VAN de KAMP, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[24] • • • • Q. Do you have an opinion as to his honesty and integrity? A. I do.

Q. And what is it? A. Very high. I hired him on the basis that he had a commitment, an interest, without ulterior motives; frankly, that he was willing to sublimate himself to his work and to his clients, and frankly to higher causes, and he did not let me down in that job.

Q. Did he ever demonstrate to you any guile or cunning? A. No, just the opposite. I mean, he's a little bit of a Jimmy Stewart kind of character, quiet and taciturn, a person who worked long hours hard for his clients, oftentimes got good results. • • • •

AERIAL C. HILTON, called as a witness by the plaintiffs, having been duly sworn, was examined and testified as follows:

Re-Direct Examination by Mr. Stein

[46] • • • • I would describe Nick as a humanitarian and I think he carried that through. I think in his private life it's that way, and he has that reputation among the lawyers. I would definitely say it would be a very difficult thing to persuade me otherwise. • • • •

MICHAEL J. LIGHTFOOT, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[49] • • • • A. I believe that Nick Allis is a lawyer of impeccable integrity, who, in my estimation from my experience with him, is incapable of doing things which require cunning.

I found him and find him today to be a man of the utmost integrity.

Q. Do you know other people who know him? A. I do.

Q. Has his reputation ever come up for comment among people? A. Mr. Stein, it has. He has such unusual characteristics that he's one of the few lawyers I know about whom other lawyers speak.

Q. And what do they say? A. They say that he is an unusually candid, straightforward human being, and I think it's fair to say that they also view him as someone who doesn't have the capability of acting with guile or cunning. • • • •

JAMES PHILIP CONN, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[59] • • • • I believe that Mr. Allis is a man of high integrity, of sincere honesty.

Q. Have you ever seen any guile or cunning on his part? Is he that type of person? A. No, no, never, and I think that it's also true in terms of his relationships with his neighbors in the community. • • • •

Cross-Examination by Mr. Cohen

[60] • • • • Q. All right. Assuming Mr. Allis as a matter of fact did what is contained in paragraph two on the second page of Judge Johnson's order. Assume that for a moment, sir. Would that in any way change your opinion that you've just given this Court concerning his reputation and your opinion about his honesty, integrity, et cetera? A. I believe that Mr. Allis is incapable of doing the action that was described in that paragraph on page 2 of that **[61]** order.

Q. I respect that, sir. Now, could you answer my question. If he did, would that change your opinion? A. It would be so inconsistent with everything that I know about Mr. Allis, as I have known him personally as his minister for ten years, it would be so totally inconsistent that it would be inconceivable to me. • • • •

DR. SYDNEY W. GROSS, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[64] • • • • A. Well, I started at the bottom of the ladder as an assistant adjunct and worked my way up so that I became head of the department, chief of neurosurgery and professor of neurosurgery at the Mt. Sinai Medical School for a period of about seventeen years.

Q. In that capacity did you have as an obligation the evaluation of people as to character and competence? A. Yes, I did. I was in charge of a training program which was approved by the American Board of Neurological Surgery for four years of training in neurosurgery. I had to select candidates for the job, and then over the years these men have practiced in various parts of this country and, as a matter of fact, all over the world, and I have seen them at meetings and I have had a chance to evaluate them and whether or not they lived up to my expectations. • • • •

[66] Q. Did you designate him as your executor? A. I did.

Q. When did you do that? A. Oh, approximately a year ago.

Q. Why did you do that? A. Well, at the time I had some family problems and wanted to change my will.

Q. Did you have trust in Mr. Allis? A. I certainly did.

Q. Based on what? A. On my knowledge of his behavior in the various matters that came up, and in my total knowledge of him socially in the way he behaved.

Q. Do you have an opinion as to his honesty and integrity? A. I have.

Q. And what is it? A. He is an individual of the highest integrity. I can't imagine Nick Allis doing anything that was unethical or immoral. • • • •

Cross-Examination by Mr. Cohen

[69] • • • • Q. All right. With that in front of you, sir, if Mr. Allis—assuming for a moment that Mr. Allis did what is set out in paragraph two of that order, if Mr. Allis did that, would that in any way change the opinion that you have already given to this Court as to your opinion of his honesty

and integrity? **[70]** A. Well, that would be so preposterous that I couldn't possibly believe that about Mr. Allis. I have known him. I've talked to other lawyers who have known him, and that would be so out of character that I couldn't possibly believe it, no matter what.

Q. But assuming for a moment—well, let me ask it this way. If someone did what is set out in that order, would it be fair to state that your opinion about them would be that they are not a person of the highest honesty and integrity? A. Well, I can't possibly tie this in with anything that Mr. Allis would do, and therefore I can't see how it is at all applicable to this matter. It's so out of character to what I know about Nick Allis and from what I have learned from other people that—I've dealt with lawyers for many years now and he is absolutely unique in the way he approaches matters and his entire attitude. I can't believe that Nick Allis would do anything of this.* * * *

Supplemental Affidavit of Ogden N. Lewis
Dated June 8, 1983

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

SUPPLEMENTAL AFFIDAVIT OF OGDEN N. LEWIS

* * * *

Ogden N. Lewis being duly sworn deposes and says:

1. * * * *

I make this supplemental affidavit in response to

* * * *

Mr. Butler's disclaimer of intent to influence the February and March jury pools.

2. Annexed hereto as Exhibit A is an affidavit of Richard A. Black, Esq., sworn to June 2, 1983. Mr. Black was counsel for defendant SmithKline in the case of *Johnson v. SmithKline*, cause number C-266659, which was tried in 1975 before the Honorable Yale McFate and a jury in the Superior Court of Maricopa County, Arizona. Plaintiffs in that case were represented by James G. Butler, Esq. I am informed that that case resulted in a defense verdict. Mr. Black has annexed to his affidavit a copy of an article about that case appearing in *The Arizona Republic* on September 7, 1975.

* * * *

7. Annexed hereto as Exhibit F is a copy of a transcription of the December 27 tape made by William Harward on June 5, 1983, together with a blacklined version to show differences between his transcription and that made by Patricia Potter (Exhibit C). The blacklining was done by paralegals employed by Davis Polk & Wardwell who compared Exhibit C to Exhibit F. Mr. Harward's biographical summary is also included in Exhibit F.

/s/ OGDEN N. LEWIS
Ogden N. Lewis

Sworn to before me t[illegible]
8th day of June, 198[illegible].

/s/ NANCY Z. BUCK
Notary Public
My Commission Expires September 30, 1984

(Certificate of Service Omitted in Printing)

Exhibit A to Supplemental Affidavit of
Ogden N. Lewis Dated June 8, 1983

STATE OF ARIZONA,
COUNTY OF MARICOPA, ss.

AFFIDAVIT

RICHARD A. BLACK, upon his oath, deposes and says:

1. I am licensed to practice law in the State of Arizona and I am a member of the law firm of Black, Robertshaw & Copple, 3003 North Central Avenue, Phoenix, Arizona.

2. I was counsel of record representing SmithKline Corporation in an action entitled *Johnson vs. SmithKline*, Cause No. C266659 in Maricopa County Superior Court, State of Arizona.

3. The allegations of the Complaint were that the drug Compazine, manufactured and sold by SmithKline in the United States, was defective and unreasonably dangerous and further that the warnings and indications set forth on the inserts provided by SmithKline were inadequate to sufficiently warn of the dangers in the use of the drug, particularly when administered to children.

4. The Complaint further alleged that the unreasonably dangerous effects of the drug Compazine were known to SmithKline long before the drug was consumed by the plaintiff Laurie Johnson. Laurie Johnson was alleged to have become permanently crippled and to have suffered mental retardation as a result of taking Compazine.

5. Trial in the matter commenced June 9, 1975. On or about Friday, August 29, 1975, in any event on a day during that week after which the jury in the case would not be in attendance in Court until the following Tuesday, I received a telephone call from one Brent Whiting, a newspaper reporter with the Arizona Republic who stated that he had been given a statement about the case by the attorneys for Laurie Kay Johnson and Mr. James Butler in particular. Mr. Whiting explained that Mr. Butler had pointed out to him that various defendants in the case had settled out and that SmithKline had offered $100,000 but that the sum was not sufficient and had been rejected. (Court records contain an Offer of Judgment of $100,000.) Mr. Whiting further explained that Mr. Butler had told him there were two matters that Mr. Butler thought were of particular importance in the case, the first being the fact that Rhone-Poulenc, the owner of the patent and developer of the drug Compazine, had withdrawn the drug from the market in France at the request of the French Government, but that

SmithKline had not informed the FDA of this fact even though it was done during the period of application for approval of the drug here in the United States, and secondly, that the FDA had made requests to SmithKline that it alter the wording of its inserts relative to the use of the drug by children and that in fact an urgent request by the FDA had been made three days after Laurie Kay Johnson had been administered the drug which caused her to be crippled.

6. Mr. Whiting stated he wanted to hear "my side of the story". I advised Mr. Whiting that I could not comment on the case since it was presently in litigation and that any article publication in the paper could be very damaging to the trial. I particularly warned Mr. Whiting that any reference to the Rhone-Poulenc situation would surely result in a mistrial and that this was probably true of the FDA situation as well. Mr. Whiting wanted to know what there was about these situations that I considered particularly damaging and I replied I could comment no further. Mr. Whiting stated that the plaintiffs' attorneys had had no such reservations and he disagreed with my thinking. I asked that Whiting call the Judge and get permission before publishing the story and he refused, stating that the article would appear in the Sunday morning paper, August 31.

7. My particular concerns over the statements of Reporter Whiting was that he was proposing to publish about facts which were in dispute as to their admissibility and according to preliminary rulings by the Court, might be admitted only with the admission of other explanatory material or under certain instructions from the Court to the jury.

8. I immediately called the Presiding Judge in the case, Judge Yale McFate, who advised me he knew the editor of the paper and would attempt to persuade him to withhold the story until after the trial. Judge McFate called me on the telephone some time later stating that the editor was unable to accommodate the Judge but that he would attempt to get the story delayed one week so that the Court would have the opportunity to instruct the jury not to read the article.

9. On Tuesday, September 2, Court and counsel met in the Judge's Chambers prior to trial. Judge Yale McFate expressed great concern over the possibility of a mistrial because of what might appear in the article to be published by Whiting. The Judge was quite aggitated that we could lose the jury after having tried the case for nearly three months. Judge McFate stated he had spoken with Whiting, expressed to him his fears about a possible mistrial, but that the most he had been able to accomplish was an agreement that the article would not appear until the following Sunday. Judge McFate stated he had taken the matter up with a number of other judges on the Superior Court Bench in Maricopa County and expressed the opinion that he believed he did not have the authority to order the reporter not to publish the article.

10. On the last trial day of that week, the Court specifically told the jury that there would be an article in the Sunday morning Republic about the trial and that they should not read it. The jury was told that if any juror read the article, they might have to be excused from the trial and that this could result in the undoing of all the time and effort that had been involved in the trial to that date.

11. On Sunday, September 7, 1975, the attached article appeared in the newspaper. The reference to the Rhone-Poulenc situation was not included. The settlements and the FDA communications regarding the warning statement "three days after Laurie was crippled" did appear.

12. One juror acknowledged having read the article and was excused for cause.

/s/ RICHARD A. BLACK
Richard A. Black

The foregoing was acknowledged before me this 2nd day of June, 1983, by RICHARD A. BLACK.

/s/ SUE MONISE
Notary Public

My Commission expires:
4-15-87

THE ARIZONA REPUBLIC
(Section B) Page 1 ○ Sunday, Sept. 7, 1975

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Attachment to Affidavit of Richard A. Black—
Arizona Republic Article of September 7, 1975

Long trial predicted in $2 million suit against drug maker

about B2

Wrongful drug suit

By BRENT WHITING

Seven years ago, when she was 13 months old, Laurie Kay Johnson became so ill that her parents decided to take her to the doctor.

The parents, LaCroy and Eileen Johnson of 5121 W. Hearn Road, Glendale, were worried that their little girl was suffering from a case of stomach flu.

They hoped that Laurie's physician could stop their daughter's vomiting and restore her to normal health.

But, instead of improving, her condition quickly worsened and within a day she suffered brain and nervous system damage resulting in mental retardation and partial paralysis in her right arm and leg.

Laurie, an attractive blue-eyed blonde and her parent's only child, had been crippled for the rest of her life.

Phoenix attorney Richard A. Black, legal counsel for the drug manufacturer, has declined comment on the suit.

Court records show that Black offered to settle the suit out-of-court May 19 for $100,000, but that the offer was refused by the Johnsons' attorneys, Jeffrey R. Timbanard of Phoenix and James G. Butler of Los Angeles.

Court records also show that three other defendants named by the Johnsons when they filed the suit in 1972 already have agreed to out-of-court settlements.

One of these is Phoenix family physician Dr. John E. Cahill, who settled for $175,000, according to testimony in the present trial. Cahill was charged by the Johnsons with administering Compazine suppositories to Laurie.

Continued from Page B-1

to pay a "minimal settlement" rather than spend thousands of dollars in extended litigation.

Evidence in the ongoing product liability trial includes testimony from medical authorities from throughout the nation. Also included are scores of heavy looseleaf binders containing thousands of documents pertaining to the history of Compazine.

Smith, Kline and French brochures indicate that the drug has been used in the United States since 1956 and that it was developed and tested in cooperation with a French pharmaceutical company which discovered it.

In medical language, Compazine is a brand name for prochlorperazine, which is a category of phenothiazine, according to court records.

Smith, Kline and French brochures indicate that the drug is intended to

In August 1968, four months prior to Laurie's illness, according to documents presented in evidence by attorneys for the Johnsons, the Food and Drug Administration ordered Smith, Kline and French to include a warning on Compazine labels that the drug is not recommended for young children.

The documents show that a Smith, Kline and French official replied two months later that in the future Compazine labeling would contain this phrase:

" 'Compazine' is not recommended for children under 20 pounds in weight or 2 years of age, except where potentially lifesaving."

Two months later, three days after Laurie had been crippled, he [illegible] wrote to the drug maker [illegible] that the revised labeling [illegible] within 30 days, according to the documents.

In February 1969, more than [illegible]

could stop their daughter's vomiting and restore her to normal health.

But, instead of improving, her condition quickly worsened and within a day she suffered brain and nervous system damage resulting in mental retardation and partial paralysis in her right arm and leg.

Laurie, an attractive blue-eyed blonde and her parent's only child, had been crippled for the rest of her life.

For nearly three months now, a Superior Court jury has been hearing evidence in a $2 million product liability suit brought by Laurie's parents against a Pennsylvania pharmaceutical company.

The case began June 9 and is expected to last several more weeks. Judge Yale McFate, who is presiding at the trial, predicts it will be one of the longest in Maricopa County history.

The defendant is Smith, Kline and French Laboratories of Philadelphia, makers of the drug Compazine, a widely used prescription remedy that is sold as syrup or suppositories for relief from vomiting and nausea.

The Johnsons alleged in their suit that Laurie's crippling injuries were caused by this drug.

The suit contends that Compazine contains toxic substances which render it dangerous to infants less than 2 years old or weighing less than 20 pounds, if not used properly.

The suit charged Smith, Kline and French with negligence by failing to disclose the alleged dangers of the drug to the medical profession at the time Laurie was treated for her illness in 1968.

other defendants named by the Johnsons when they filed the suit in 1972 already have agreed to out-of-court settlements.

One of these is Phoenix family physician Dr. John E. Cahill, who settled for $175,000, according to testimony in the present trial. Cahill was charged by the Johnsons with administering Compazine suppositories to Laurie.

Cahill's attorney, Robert G. Beshears, has declined comment on why the doctor decided to settle the suit.

The other two defendants settling out-of-court were Phoenix neurosurgeon Dr. Harry Danielson and St. Joseph's Hospital. Lawyers decline to discuss the amount of settlement, but court sources indicate that it was less than $10,000 each.

The suit alleged that Danielson treated Laurie at St. Joseph's Hospital about 14 days after she was treated by Cahill, but that Danielson failed to diagnose Laurie's condition as a reaction to Compazine.

Danielson's attorney, Walter Cheifetz, denies that the doctor was guilty of any negligence but said that Danielson agreed to pay a "nominal sum" to avoid the high cost of defending himself in a prolonged trial.

And Roger C. Mitten, attorney for St. Joseph's Hospital, denies any negligence on the part of the hospital but said that hospital administrators agreed

Continued on Page B-2

Smith, Kline and French brochures indicate that the drug has been used in the United States since 1956 and that it was developed and tested in cooperation with a French pharmaceutical company which discovered it.

In medical language, Compazine is a brand name for prochlorperazine, which is a category of phenothiazine, according to court records.

Smith, Kline and French brochures indicate that the drug is intended to control nausea and vomiting and to reduce excitability and hyperactivity in children with behavior disorders.

Excluding the suit now being tried before McFate, court records show that the drug manufacturer has been involved in 21 other product liability suits in cases relating to Compazine.

The records show that four of the cases still are pending in Florida, Illinois and California and that the others have been closed, either in judgment for Smith, Kline and French or in settlements ranging from $3,000 to $300,000.

In their suit, the Johnsons contend that at the time Laurie was treated, Smith, Kline and French expressed warranties to the medical profession that Compazine was effective, proper and safe and could be used without fear if used as directed.

But the suit argued that Smith, Kline and French failed to warn doctors of the injuries that could result if the drug were misused. The suit said the firm also failed to indicate steps to be taken in the case of excessive use of the drug.

Compazine is not recommended for children under 20 pounds in weight or 2 years of age, except where potentially lifesaving."

Two months later, three days after Laurie had been crippled, the FDA wrote to the drug maker and urged that the revised labeling take effect within 30 days, according to the documents.

In February 1969, more than two months after that, the documents show, Smith, Kline and French replied that the new labeling would be put in use beginning in March 1969.

Other documents presented in evidence contain this 1972 memo written by a Smith, Kline and French official:

"In 1968 he (Dr. Cahill) prescribed 2.5 mg. 'Compazine' suppositories for a 13-month-old, 22-pound child; 7.5 mg. was administered over an 18-hour period.

"After the third suppository, the child suffered a convulsive seizure which Dr. Cahill considered epileptic rather than related to the use of 'Compazine.'

"After the seizure the child's right arm was paralyzed . . . Four years later the child is still 25 per cent disabled."

Another document presented in evidence contains a 1972 Smith, Kline and French memo which notes that a suit had been filed by the Johnsons. It reads:

"The plaintiff is suing for $2 million but Dr. Cahill believes it is a nuisance suit and they hope to settle out-of-court before trial begins."

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Exhibit F to Supplemental Affidavit of Ogden N. Lewis
Dated June 8, 1983

TRANSCRIPTION OF CONVERSATION HELD ON 12-27-82 BY KRYSTYNA JANOWSKI AND FLOYD HUMPHRIES AND NICHOLAS ALLIS (FIRST TAPE RECORDING)

Time		
4 sec.	*F*	*(U.I.) ok uh huh.*
	M	*Alright thank you.*
	F	*Thank you*
33 sec.		(Movement and walking sounds approximately 20 seconds)
		Sound of knocking on door
	F	*Go get it I'm (U.I.)*
	M	*Si*
	M	*Who is it?*
	N.A.	*It's Nick.*
	F	*(U.I.)*
	N.A.	Kay
	F.H.	*So far so good. You've got that sheet with you—that paper?* (Traffic noise in background)
	N.A.	*Yeah.*
		(Click sound—possible stop/start of recorder)
	M	*(U.I.)*
	F.H.	*Luis*
1'05"	*N.A.*	*Beg pardon . . .*
	M	(U.I.)
	F.H.	*I think there's gonna be trouble.*
	N.A.	*Ok.*
	F.H.	*Asking each other whether they're expecting (U.I.)* (Sounds of muffled voices, footsteps and door being answered)

---

* Italized material is underscored in original.

M *I'm Luis. . .*
N.A. *Hi Luis. I'm sorry to bother you folks.*
L.C. *No it's come in, come in.*
(Voices overlapping).

1'30" K.J. *Come in.*
F.H. The last thing you want is a delegation.
K.J. Oh . . .
F.H. But ah, there's a there's a humane and a and a friendly reason—okay?
K.J. *Yes.*
L.C. *Okay, sweli.*
K.J. Floyd, you haven't met my roommate, Luis Castillo.
F.H. Hello Luis.
[Garbled]
F.H. Thank you.
(Sound of door shutting)
N.A. Sorry to interrupt your . . .
K.J. Well we were *all* going to be planning on going to bed real early tonight *anyway.* We're making plans for my little girl. *She'll probably be home in two or three days.*
F.H. Oh, *that's good.* I don't want to sit *down* here all by myself.
K.J. Okay.

2'06" F.H. Nick, one of us can . . . Nick . . .
K.J. Okay
F.H. Well . . . [garbled]
N.A. O h h h . . . So how is . . . how is she doing today?

2'27" K.J. Well, she lost a little bit of weight. But sometimes they urinate or something just before the weight is taken. So that doesn't necessarily mean anything, *but then again* [garbled]

N.A. Right.

2'39" F.H. We noticed two fellows out there.
K.J. Oh, they follow me around all the time.
F.H. *Do you know that those two guys are out there?*
K.J. [Chuckle] . . . you're kidding!
L.C. That's *the fourth car we've seen sitting out there.*
K.J. (U.I.) *problem* I haven't seen (U.I.) *that great. . .*
N.A. Oh no, they are probably *after* (U.I.)
K.J. Well the people next door *are constantly under surveillance. The guy is a* (U.I.)
N.A. Oh, is that right?

3'0" K.J. What did he call him—*Peter Sellers and he's always being (U.I.) round and you can never catch him.*
F.H. Wow . . .
K.J. *Those are the neighbors* . . . Because of them we changed from a back apartment to a front apartment. Because there were a lot of *police always* trying to break up wild parties and then they were always screaming and the wife beating her up *and this went on every night so we changed you know* (U.I.).
F.H. Is that right? Wow.
[Pause]
K.J. Yeah

3'24" K.J. Did you ever find out *ah did ah* . . . Do you know what arrangements have been made about my vacation pay and my paycheck?
N.A. No, I can check *if* you want me to.
K.J. Yeah.
N.A. Do you want me to?
K.J. Yeah. Because *ah with her coming home* (U.I.) . . . I have I have absolutely *not discussed it with* (U.I.). She may very well . . . I talked to

Dr. Shore [spelling] today. She may very well be home by (Noise obscures voice)

N.A. *Okay.*

3'49" K.J. And my mother will be coming out *because the first thing she wants to do is come and visit* and help with the baby . . .

N.A. Okay . . .

K.J. . . . (U.I.) and I can hardly have her out here without . . . you know (U.I.) (Noise interferes).

4'00" *N.A. Right.*

K.J. Because Luis is *going there* on Friday. Most of my personal mail is still going to be coming to the office this week. *If my family writes . . . have any address or any other instructions to accept my mail.* And Luis talked to Jackie this morning (U.I.). Please give it to Jackie and I'll pick it up on Friday. (U.I.)

4'22" N.A. *Okay. Ah . . .* (U.I.) *he asked about you working at home . . .* (U.I.)

K.J. I really think this was the atmosphere (U.I.), *surprised by* my attitude towards the firm. *I've been very negative. I mean there have been things you said* aggravated the hell out of me.

N.A. Yes. I've never noticed that at all. You've always been so good . . .

K.J. You caught me at the right time. *You always caught me at the right time.*

N.A. Yes but there's been more than one time.

F.H. [Chuckling]

4'48" K.J. *Well you . . .* Besides, I know nobody takes me seriously anymore. But I really am . . . going to go to Houston one of these days . . . I really . . . *it's been two years* now I've been talking about it. But I just think I need a change of pace.

And maybe . . . Oh, by the way—do you know what Roxanne's salary—*talking about* (U.I.) she just got a raise of—she got a raise of *forty dollars* (sounds like) a month.

N.A. Great.

K.J. She's making *three one sixty* a month. The reason for that is, they anticipate next year and the year after, making even more money that they

5'20" did this year; and the (U.I.) *probably said*—give all your girls a thousand dollars a month raise because the government will just take it all.

N.A. Right.

K.J. So . . . I have never heard . . . Their receptionist makes more than our top secretary (U.I.) . . . you know *sticking* (U.I.) the money and (U.I.). And they're remodeling again.

N.A. *That's a wealthy* firm.

K.J. Oh my God, yes.

N.A. Is it (U.I.).

K.J. (U.I.).

N.A. They don't have tough cases like we do.

K.J. Yeah.

N.A. (U.I.)

5'42" K.J. Also, they don't have to solicit cases or wait for a case to be *referred*. Everybody knows this. If somebody gets run over by a train . . . *ah they call Pete Jamail* (phonetic) (U.I.). *That's why he's famous.*

N.A. Ah maybe you can get back in there?

K.J. I won't work any more for any law firm. I would rather work for a firm where I can use my Spanish and get all the secretarial work—somehow, *eventually.* Like a job with John Reeves' (phonetic) office (U.I.).

M (U.I.).

6'10" K.J. As a matter of fact, John called me at the hospital—he left a message—I wasn't there. And when I tried to call him back, he was out of his office.

K.J. But, ah . . . I may take *some time* (U.I.) *at the State of Texas.*

N.A. Ah yeah (U.I.).

K.J. Well the thing is that to be a secretary, you die a little bit every day. You *are going to have to* (U.I.) you use *only* your fingers and you *don't* . . . I mean you don't develop. You'll *never get* anything (U.I.) unless you try. *So* [Pause] Why *did you* (U.I.) *did John ask you to* (U.I.)?

N.A. (U.I.).

K.J. [Chuckling]

F.H. Yes. Well I had—I had one. I mean I . . .

K.J. Maybe I should be.

N.A. Oh, you'd probably be better organized.

7'00" [Pause]

7'06" K.J. Actually, I should have quit several months ago because I was just increasingly unhappy and I didn't want to work anymore.

N.A. Yes. (U.I.) I myself strongly believe that your dissatisfaction *for* whatever it is *you thought, you know*, is completely exaggerated.

7'25" K.J. Well, I don't know. *There are things* that irritated the hell out of me—the smallest teeny, tiny things.

7'30" [Knock on door]

K.J. Come in, come in.

N.A. Wait.

M (Voice from door) (U.I.)

K.J. Just a moment.

M (U.I.).

K.J. Hi. I have two unexpected visitors here.

M Ah, okay. Alright I'll talk to you later. [Male with deep voice.]

K.J. No problem.

M See you Luis.

K.J. One of the things that was driving me crazy was that *ah* Davidia was lording it over me. "Oh, I make more money than you do and I have better parking arrangements than you do and I'm more valuable to the firm." And I thought well, Jesus Christ—you know—there was one parking spot, a $100-$115 a month. And that was . . . *What really got to me* at this time I'd walked four blocks in the morning and I'd say boy—they take better care of *the new* (U.I.). But I think Davidia is our newest secretary—if I'm not mistaken. And I just *thought* that well, what the hell. *You know, what do* I . . . I should *have* quit *months ago* because

8'10" I was unhappy. I felt that the firm was . . . (U.I.) And . . . *I'm* just unhappy. *I quit a long time ago and not let things come (U.I.).*

N.A. I *personally* don't have any idea what she (U.I.).

K.J. Oh yes she is. She's paid . . . Davidia is being paid more that I. *She's paid.* And so when I would ask her to help or something, *her attitude*—you know, off the record, would be you should be helping me. You know . . .

8'37" N.A. Did she tell you what she was (U.I.)?

K.J. Yeah. She was *dancing up and down happy.* She said that Michael Dan had personally authorized it. And I was sitting at my desk just a couple of weeks ago when Michael asked her "Did your raise come through?" You know, "Did you get it

in your last paycheck?" And Davida was *very upset* because no it wasn't. He said "I'll tell Jean right now. I'm sorry, it slipped my mind. (U.I.)." He gave her $100 a month raise (U.I.).

N.A. (U.I.)

9'00" K.J. And it was just little things like that, like ah . . . My unhappiness was not just related, you know, to this latest incident. It went way back. *And you know, I guess* that hostility just carries over.

9'14" And so now, when Jim Butler *told* me on the phone this morning *that* he wanted me to come into the office—what was the big hurry? I was trying to breast feed my baby. I was trying *to teach 'em to suck and* swallow—and to be called away from that to go to the telephone because Jim Butler wants me to come to the office right now—my attitude is, I don't *really want to stay.* I was *really* angry *about* that. I *mean* his timing, unfortunately, was very bad.

N.A. (U.I.)

K.J. OK. And the fact that this problem follows me to the Intensive Care Unit of the Hospital and pops up at my house in the middle of the night. I am not exaggerating when I say—like *my* when George Barnes . . . Look . . . Look, I got the message at the Hospital today (U.I.). Round the clock harassment. And ah *ah* . . . What could I say. I'm telling you what I told George *just an hour* ago *he was by.* And I said look, I'm going to go see this lawyer tomorrow. I *rather than* call and cancel and not go. You know *what—I'm then going* I'm going to ask him to get some kind of restraining order to keep everybody away from me until at least my little girl gets out of the hospital because right now I'm under all this pressure.

N.A. Yes.

10'10" K.J. And these people were this and those people were that and . . . Well some of the conversation going around about money is, you know, very lucrative. I'm thinking to myself, Jesus Christ, you know, this is not my fight. This is your fight and this is her fight. It's not my fight. There's nothing . . . I have nothing to gain by getting . . .

N.A. (U.I.)

K.J. As I said to you two, a position between two opposing *fissions* (phonetic).

F.H. You know . . . I . . .

K.J. It's not my fight.

F.H. *Nick . . . You know I . . . I . . .* I haven't heard all of this before. And ah, I'm here because—for two reasons. And I think I could explain [*laughing*]. *Walking in on you* unexpectedly.

10'44" K.J. I like *having* the company around.

F.H. Well first of all, I heard *basically* what was coming down and it sounded pretty bizarre, you know. But the main thing is *to protect* . . . The main thing that disturbed me was the fact that . . . I personally always liked you. I mean we just have a light, pleasant relationship and everything that I ever wanted done was done

11'11" perfectly. And I haven't really heard about all these other problems. But hearing them now and hearing secondhand what has come out in the last couple of days *and*—last week, *ah* made me realize that things should be *able to be* a lot better for you now that you are having a little child coming home from the hospital. And I happened to have had personal experience in the kind of tactic

11′45″ and the kinds of things that started this whole thing going and I just thought I'd throw my two cents in (*U.I.*). It could be very uncomfortable for you and I would like to assist you in any way that I could to keep you from being pestered and harassed. And so that they don't feel that there is something that they'd like to either get from you or threaten you about, *alright. And this is* . . . This to me, I think, is the most *indecent* and cruel thing to do to someone with all the other pressures you've got, especially coming from the hospital. I've seen this before.

12′37″ K.J. I've *never experienced*, you know . . .

F.H. I've seen it with witnesses. You know. And I've seen it with people basically in a situation where there's a lot *at stake*.

K.J. There's a lot *at stake* for them, *that's true*. But not for me.

F.H. *You know* . . .

12′50″ K.J. You know, some of the things he pulled trying to ingratiate himself backfired. Like he'll walk around here and he'll say Jesus look how you live (*U.I.*). My God *bring* a little baby into this. You know they don't take care of you. His answer is—we'll take care of you. And we'll—we'll right all these wrongs. And I'm thinking to myself but he doesn't know I live like this because I chose to and *I didn't have the* money.

F.H. Yes.

13′11″ K.J. I gave up an extremely good relationship because I would rather be the wife of a poor man than the girlfriend of a rich man. Now he doesn't have any of his background. I'm in this situation because I put myself in this situation.

F.H. Yes. Yes.

K.J. All he looks at is oh look at how terribly you live; and oh you poor woman, *oh you poor* . . .

we can't let your little girl come into this situation. We'll find a beautiful apartment for you [*chuckling while saying this*].

F.H. Yes.

13′31″ K.J. And it's really funny—because he's spending somebody else's money. What does he care? You know. I'm sure that one of the reasons he's coming to see me day and night is because he's *billing* by the hour. And he's going to be here as much as he can and is . . . because he's building up [garbled] bill. [*Chuckling through this statement.*]

F.H. Honestly, does he still have any reasons to feel this—this idea that somehow *ah* you know or you said that Mrs. Koller talked to you?

13′59″ K.J. No, he wants me . . . *He will bet on* somebody to say it. They don't *give a hoot*.

F.H. *Yes. I want to hear* . . .

K.J. They want . . .

F.H. I want to hear . . . I'm very curious.

K.J. They want someone to recall a conversation with Mrs. Koller that she never took Bendectin during that first trimester. You know, that she may have taken aspirin, or whatever the hell. I don't know. I wasn't involved then. But they have a transcript of *the* alleged conversation that they *want*. You know. "Do you remember? Think about a little more *of the* conversation." That type of thing.

14′28″ F.H. Well what do you think about that—*that* they say they have *some transcript*.

K.J. Well that's criminal fraud. I mean if somebody actually said that . . .

F.H. Yeah.

K.J. *And was (U.I.)* . . . I don't know, *I don't (U.I.)*.

F.H. Did you ever talk to Mrs. Koller?

K.J. Well I've talked to her, but only, you know, to ask her if she wanted coffee and ah, you know, get her on the telephone for Nick Allis (*phonetic*).

F.H. *Did she have* . . . Did she ever mention to you anything about the *pill* or the Bendectin?

14'50" K.J. I have no trouble *with* making a statement to that effect. You know. The only *contact I would've had* with Mrs. Koller, personal contacts, they don't even know about is because it never came up in the conversation. I had sent her a book called "How to Raise a *Retarded* Child", and said look, I had a little girl once and this book was tremendously interesting to me. You have so many children, *(U.I.). Or something to that effect.* I think there's a copy of that in a green book *(U.I.).* It just . . . It just so happens that I have never been asked by anybody had you

15'21" ever had a personal friendship or personal relationship . . . This . . . This was a year ago. This was a long time ago.

F.H. Yes.

K.J. And I specifically didn't mention that to them because they said to me, you know, what's been the extent of relationship with Mrs. Koller (phonetic)? I specifically didn't mention that because then they'd *jump up* and say ah ha—she was a personal friend of yours and may have confided in you.

15'36" *F.H. Yes.*

K.J. So I didn't mention that at all. You know ah . . . by omission *I left (U.I.) it out.*

F.H. Yes.

K.J. . . . *as not relevant [sounds like].* So . . . I told George today—I said look if this . . . if this harassment *is going to continue*, I am going to go see that lawyer tomorrow. They arranged for

me to see some kind of a lawyer for me to talk to.

F.H. Yes.

K.J. Um—Carl *Stuck* (phonetic)?

F.H. Um hum.

15'58" K.J. And I said look maybe he can do just one thing for me—two things. Maybe he can get some kind of restraining order so that nobody comes to see me or at least

16'04" don't come to see me at the hospital. And so I can get my paycheck and go away. I want to go far away—go to Chicago, go to Mexico, you know. Ah I don't want to. I don't want to be vulnerable to these kinds of harassments.

16'15" F.H. Yes, yes. Well when you ever talk to any of *(U.I.)* these guys . . . Especially at the hospital . . . It must have put you in a . . . *(U.I.).*

K.J. Well it's embarassing because, you know, everybody in the hospital knows me. You know, it's not . . . it's not nice to have people see me . . . and you know, all this personal *stuff is infringing* . . . all these calls that come to the hospital.

16'34" *F.H. Yes.*

K.J. I mean not that there's so many calls. But that's a very busy critical *period*. You know, that's not, you know, for personal phone calls. Um . . . (U.I.).

F.H. Yes, Yes. But there's just plain no truth in that kind of . . . *(U.I.).*

K.J. *(U.I.) I have a . . . Oh, it's not important though.* No there isn't . . . but they want to find someone that they can use as a ah . . .

16'58" someone that they can as a ah . . . someone . . . something they can show to the Judge because they have no case—*okay*—in the Bendectin matter.

F.H. *Yes.*
K.J. And they're trying to . . .
F.H. *Okay.* How can we help you? How can we help you ah . . . prove to them or . . . or clear you of this harassment? I think that we should . . . I
F.H. feel, frankly, (U.I.) . . . I feel that we should do something to protect you and to . . . ah . . . and to see to it that you're not harassed. I think that whoever . . .
17'28" K.J. The only reason they're harassing me (U.I.) I'm sitting there, you know, they can come to my door. *Whenever* I'm at the hospital—they can stand in front of the hospital door *and wait for me.* Okay? *I wanted* . . . That was the specific reason I told Richard yesterday—please get my paycheck and get my vacation pay [smacking fist]. I am leaving. I don't know whether I'm going to go to Houston or go to Mexico. I just want to go away because it's not my fight. And I don't feel kindly disposed towards your *lawsuit.* I know I just . . . The hell with it. I want to leave.

17'54" F.H. Well you're very honest and you are entitled to your *feelings. You know what Nick? I left my keys (U.I.)* [Sounds like coins dropping on the table].
(U.I.) *Back in a minute.*
K.J. *Okay.*
F.H. *(U.I.) I know I . . . (U.I.). Well . . .*
(U.I.) I'll be right back. Can I open this?

18'19" K.J. *Yeah*—just . . . inside the handle—you have to reach inward—that little round bar—the round little . . . no all the way down on the bottom. *No* the round doorknob . . .
F.H This one?
K.J. No . . .
F.H. This one.

K.J. . . . no, all the way down. Reach all the way in. *Do you see where the metal thing is?*
F.H. *Not yet.*
K.J. *You* turn that.

18'36" F.H. Oh. Thanks. [*Chuckles*]
(Sounds of walking, street noises and sounds of tape recorder being handled).

19'21" Recording terminates.
(This is the end of the first recording, the time on the cassette copy is irrelevant as it would not directly relate to the time of the stopping of one recording and the start of the second recording).

(SECOND RECORDING)

0'00" Start of recording (pulse sound)
(Sounds of walking and movement)

0'08" *Sound of knock on door.*
K.J. . . . *(U.I.) through the law. I kind of felt like my name (U.I.).* And the firm has more than enough money (U.I.) to *hire* more temporary secretaries. (U.I.), you know, fair at all. *And so, now that I'm being approached by these people,* ah I'm not particularly inclined to not listen to what they've got to say at all for the simple reason that I'm very hostile towards the firm. I told that to George earlier this evening. *He came to see me. I said look* I'm not (U.I.) *hostile,* I'm hateful and angry. And I'll go on the record as saying I'm hostile and hateful and angry. So what good am I to you? I'm . . . I'm biased. *I'm (U.I.). You know* . . . And that's documentable. He doesn't care. They don't *care.*

0'59" F.H. Yes.
K.J. *[Pause] That's all they are interested in?*
M *Yeah.*
K.J. *Soap opera.*

N.A. *One part that I couldn't you know lose sight of (U.I.) that I certainly appreciate use in the beginning (U.I.) so to speak . . . (U.I.). Don't you feel we are?*

1'24" K.J. Yes, that's why I liked working for you. It was like working for Robin Hood. You know, *ah* rescue little people who are being trampled by big people.

N.A. Yes.

K.J. Yes.

N.A. (U.I.) That's why . . . I . . . I never asked you to (U.I.) . . . appreciate it (U.I.). But . . . To me . . . and so I'm trying to encourage . . . I'm a little bewildered by the resentment that you have against our firm. (U.I.). But to me, that is something aside and apart from the rights of somebody who is going (U.I.).

K.J. Yes.

2'25" N.A. *(U.I.). I would would assume that you would agree with that. (U.I.) you know, (U.I.). That's all we are trying to do* as far as I can see. *How do you see it?*

2'50" K.J. *Ah*, as I see it, *ah this is (U.I.)* problem *hand in hand (U.I.).*

N.A. Of course.

K.J. Apparently they asked *you to check with (U.I.)*, see if she—or who is she? Who really is she? *Do you think she (U.I.)?* Background checks. *This* background check and comes up with all this tremendous information. And *ah* then we . . . Apparently has himself *blown this up* to be . . . hey—this girl could be a key witness. All he's trying to do *is fatten (noise, his fee, I think.*

3'20" K.J. *He's here around the clock!* I'll go to the hospital in the morning and I think I see him, you know, the guy slips behind the building [chuckles]. *Now am I imagining this*—am I paranoid . . . *Is* the guy actually following me around day and night? And *ah* . . . as I said—he was here ten days to two weeks ago. He knocked on my . . . first time I ever saw him in my life. He knocked on my door and asked for somebody. I don't remember their name—John Smith, Frank Doe—who used to live here, *(U.I.)*. How long have you been here, how long ago have (U.I.). *You know* I'm answering his questions. He says well where do I get more information about a former tenant. *If I want some information about a tenant,* who do I talk to? And I told him who to talk to *[chuckling]*. So naturally he went right down and got all kinds of information from, you know, the landlord who lives right next door.

3'58" K.J. I'm sure that's what he did 'cause he asked me—where do I get information *about—a former tenant . . .*

F.H. Yes.

K.J. And the next time I saw him, he popped up here at my door, and that was on . . . Thursday night or Friday night . . . ah with Pat Ryan. And Pat Ryan

4'13" I recognized immediately. He introduced himself. He said this . . . I'm so and so, here's my card, and here's Pat, my associate. And I looked at Pat Ryan and I thought—you know, I (U.I.) my eyes. He looked pretty familiar. Then when he starts talking, I recognized his Oklahoma accent [?].

F.H. (U.I.).

4'33" K.J. *(U.I.) before*. But I guess, you know, *in* T-shirt and jeans, he probably figured he was very *different*.

N.A. Yeah.

F.H. *Nick, Nick*—I think that the one way that you are going to keep these guys from pestering you

and bothering you is to *declare* once and for all in the clearest, simplest way that you did not hear Mrs. Koller ever say that she didn't take Bendectin.

[N.B. —*THIS PHRASE JUST RECITED BY MR. HUMPHRIES WAS SPOKEN IN A VERY DELIBERATE MANNER.*]

5'04" K.J. I have never had any conversation with Mrs. Koller—other than would you like some coffee . . .

F.H. Alright, alright, right . . .

K.J. (U.I.).

F.H. But you see, at this point, they just . . . they still feel they've got a chance because of this hostility and they want to manipulate . . .

5'19" K.J. Plus the fact that I'm not on record to the contrary.

F.H. That's what I'm saying. And because . . . As long as you're not on record *to the contrary*, there's room for manipulation and there's room to make money by putting in more hours—right?

5'31" K.J. Yes.

F.H. Okay. Well . . . You know . . . I just feel, you know that ah if you could, in a simple way, in . . . in language that you accept, just state that one simple fact. Basically . . . Ah, then they're going to figure . . . they're going to fold up their tent and go home, you know.

K.J. Um hum.

6'0" F.H. Because . . . there's nothing more in it for them. And I'll tell you something else. *Let them object* (U.I.) . . . Let them *try to* intimidate you.

K.J. They're *never* trying to be friendly.

F.H. No. Well you see, there is two sides—there's the . . . there's the velvet glove *and there's the* . . .

K.J. . . . and the carrot and the stick.

F.H. and the mailed fist.

K.J. Uh huh.

6'20" F.H. The mailed fist is what is implied. Why would they want to bring up to you a . . . *copy* [sounds like] [of a] birth certificate? Why would they want to mention to you past records which we *certainly don't* (U.I.).

K.J. I do not understand that. I wish I knew (*U.I.*) *go ahead.*

F.H. Look, ah . . . Let me . . . This is where I come in . . . .

K.J. Why would they go to the extent of photographing her *birth certificate*?

6'38" F.H. Krys, Krys. This is where I come in. Okay. This is what really made me furious, frankly, and I said at the time—I've got to talk to Krys and tell her that, um, this is just the beginning. This is just the beginning. If they feel as though they can threaten you, they'll keep you in a state of nervous tension and stress. And I'm saying to you that what's past is past, especially as far as the firm is concerned and the record is there for anybody to look at. I don't know what it is and I don't care. I've got a (U.I.) *of the* record myself, *whatever* but . . . *ah* I'm just saying that . . . that there's no need for you to have to put up with this. You know . . . I mean wouldn't you want it that way?

7'30" K.J. Yes. The only thing that they're interested in is getting a statement from someone (*U.I.*) that

7'36" (Drop out—possible break in recording) Koller said. I think *that they* . . .

F.H. Alright.

K.J. . . . that they have no case unless they can get someone . . .

F.H. *Alright* . . .

K.J. . . . to refute what Mrs. Koller is stating in front of the jury. I don't know, maybe . . .

F.H. That's true . . .

K.J. . . . *this is the only possible* . . .

F.H. I agree with you. I agree with it. I agree with you. And by the same token, if you were willing to sign a simple statement, you know, saying that what they're trying to put into your mouth isn't true, you know. And it doesn't in any way ally you with this firm. It simply is a selfish act on your part . . .

K.J. Yes.

F.H. . . . to avoid this continual, *ah*, unpleasantness.

8'17" (click click sound)

K.J. Um hum. I have no quarrel with that, you know—bring *me* or send me such a statement or pull it out of your jacket pocket by coincidence—I have no problem . . .

8'25" F.H. Krys, *Krys (U.I.)* . . .
[*Janowski chuckling.*]

F.H. . . . *you know something—you'd make a good (U.I.)*
[*Janowski laughing most heartily!*]

F.H. Pull it out Nick! [*Humphries chuckling*] *By golly it just so happens!* . . .

F.H. Just pull it out!
[*Loud laughter*]

K.J. This saves me the trouble of typing *one* up myself.

F.H. Now, *what do you want to do*?

N.A. You . . . *You tell me—you might want to cross* . . .

K.J. . . . cross . . . I have to cross something out to look like I did something . . .

F.H. T h a a t' s right! You understand. You understand! *See* . . .

K.J. It's much easier than making a lot of notes—don't you think? [*Laughter*]

8'50" N.A. Well, no. I *prefer* a little longer, more detailed thorough job *than (U.I.)* would.
(U.I.) . . .

K.J. *Okay.* That's the copy for me? I don't need a copy. [Pause] um . . . Matter of fact, I talked to my doctor about this last week, how upset I was *since* I quit my job. I felt (U.I.) of my life and (U.I.). And he told me to quit my job *and not to make an issue of it. He didn't (U.I.).*

9'22" F.H. We're not here to talk you out of any of your feelings, Krys—absolutely not. Right Nick? I don't think that's . . . that's our part, you know.

N.A. You're entitled to your feelings . . .
(Both Allis and Humphries talking at the same time. U.I.)

F.H. That's the truth.

9'45" K.J. This is true. They've been making tremendous promises about relocating me within twenty-four hours *and make it sound* it sounds to me like a . . . A plane would be chartered to fly me away that would . . . to sunny climes, or whatever. Really, it's been quite flattering. I've never had such attention. [Chuckling.]

10'03" *F.H. It makes you think that you were (U.I.)* . . .
[*All three chuckling and talking together.*]

K.J. It would have been fun to see what they were willing to pay for that statement. I mean, just for the hell of it!

10'11" F.H. Yes.

K.J. *He probably* . . . If somebody said I'll sign for $50,000 and *he would have asked his employers* for $100,000 *and kept half* . . . *No question about it*. [Pause—16 seconds.] They misspelled remuneration. No one will ever know *I never use that word.*

N.A. *I don't have (U.I.)*

K.J. [Chuckling] That was one of the reasons for my hostility, was that I felt that Sandra had been hired to replace me.

N.A. No, . . .

K.J. *No?*

N.A. . . . we needed *that new* secretary. I would never have Sandy as a secretary (U.I.) *she's such a poor speller. I don't know if you have noticed that, but . . .*

11'05" K.J. Um . . . Actually, no I didn't, *but* she's ah . . . She's made a . . . She's a very, very hard worker.

N.A. *She's a hard worker, yes.*

F.H. *Oh, I know . . .*

N.A. *(U.I.) yeah.*

K.J. Floyd, could you just hand me my purse over there.

11'20" N.A. *I didn't believe . . .* The reason that I didn't have you take over that motion was I knew that you had *had* a late night (U.I.), *baby. I wouldn't want to get you involved in a situation where you (U.I.).*

K.J. *Um hum.*

11'33" N.A. In addition, however, *although* you seem to think that it was *un*important. But that was very important to me in getting that booklet (U.I.) out and not worrying about it. *(U.I.). I wanted to give that (U.I.) to somebody who could do it and I wouldn't have to worry about it (U.I.).*

K.J. *That's the one that (U.I.) subpoena?*

12'00" N.A. No, no. I'm talking about the . . . Remember the booklet *where you contacted the (U.I.)?*

K.J. *Oh yes.*

N.A. *(U.I.)*

K.J. I understand (U.I.) . . .

N.A. Yes, I guess I feel bad for not being sensitive enough to your feelings about that; *that I, myself, was being protective at this point of (U.I.). I just . . .*

12'32" K.J. *Well I had a . . .*

N.A. *. . . I would really like . . . respect. I just want to (U.I.).*

12'37" K.J. Remember that one Friday I left because, I told you, I had to go to the hospital and I left. And you tried to reach me that Friday because you didn't find some of the things . . .

N.A. *We just wanted to get the . . .*

12'47" K.J. . . . you couldn't find the files, and you called the hospital and I wasn't at the hospital. The reason for that is, I collect my breast milk during the day and ah . . . Well when I was working I took *it out to* the hospital (U.I.) *need it*. That day, when I left the office—I left the office at 5:45. Luis, my roommate, *has been* madder than hell that I had been tied up 45 minutes. Before he used to fight with me because [quote] Nick Allis was more important that I am—*you stay for him* (U.I.). Now, he was fighting with me because Nick Allis is more important than the baby is. Well push came to shove. When we were driving out of the garage of the hotel, he took the baby milk, that I had saved during the day, and he says you think after waiting for you all day that now I'm going to take you to the hospital and wait some more? And he threw *the milk* out the window. And I got hysterical and started crying and he took me home and we had a big fight. But that's why I ran out of there in a hurry to go to the hospital, and you called the hospital and I wasn't there. I wasn't lying to you when I said I . . .

13′32″ *N.A.* *No, I didn't think so . . .*
K.J. You know, but I mean . . . I have been having tremendous conflict *about this.*

13′40″ N.A. (U.I.) That's why I'm sorry we have this tremendous case come up just at this particular time . . . *And ah* . . . [10 second pause]. (U.I.)
K. J. Um. [Pause] *(U.I.) speak to (U.I.).*
M *Chuckles.*
[Pause—17 seconds. Footsteps, sound of chair moving and papers being shuffled. More footsteps. *This goes on for about 40 seconds.*]

15′23″ *F.H.* *Damn, I thought (U.I.).*
K.J. *[Chuckling.]*
N.A. *(U.I.).*
F.H. *[Chuckling.]*
[Pause—16 seconds.]

15′41″ *K.J.* *I don't even know what today's date is.*
N.A. *The 27th.*

15′49″ K.J. I don't need a copy of this *'cause I'm* (U.I.).
[?] No.
[Pause—10 seconds. Sounds of footsteps.]

16′02″ K.J. This is not relating to any ah . . . remuneration. But I would like them to have my check and my paycheck for Luis on Friday. It's pretty important to me.
N.A. *I don't think it's any problem at all.*
K.J. Well *our* whole budget was planned around my . . .

16′15″ *F.H.* *Yes.*
N.A. *Yes.*
K.J. . . . paycheck being on that day.
N.A. *Yes. But ah . . . [pause] . . .*
[Sounds like briefcase being opened or closed.]

16′26″ K.J. As a matter of fact, I even considered getting myself fired by just, you know, wiping things off

my S-20 machine. Ah, I didn't want to quit. You know, *it's terrible enough to be a quitter.* Why should I quit. Let 'em fire me. I've had that attitude *for weeks which I can't quite explain.*
[Pause—9 seconds]

16′50″ K.J. These people aren't going to stop at this. They're going to go to try to find somebody else.
[?] *Yes.*
K.J. *You think it makes* any difference to them who they get.
F.H. I agree with you.
N.A. *(U.I.).*
[Pause]

17′03″ K.J. . . . it seems awfully short, *it seems to (U.I.).*
N.A. *Yes (U.I.). I think (U.I.). If you want to make it stronger or* (U.I.).
[Movement about room]

17′36″ (Sudden increase in sound level of recording)
K.J. . . . *(U.I.). The thing is (U.I.). Hey,* you've already *(U.I.). You've already copied (U.I.)*
. . . you've already (U.I.)

17′43″ Recording terminates.

BIOGRAPHICAL DATA

William E. Harward, Jr.
Consultant
3507 Charleson Street
Annandale, Virginia

GENERAL BACKGROUND

Mr. Harward retired as a Chief of the Engineering Section of the FBI on May 13, 1977. After over 26 years serving as Special Agent he is now self-employed as a forensic and security consultant, Annandale, Virginia. He is married and has four children.

He served in the Engineering Section of the FBI Laboratory from 1961 to his retirement and has received numerous commendations and awards for outstanding performance.

Prior to 1961 he served as a Special Agent in New Orleans, Boston and Washington, D.C. handling a wide range of investigative assignments in both criminal and security investigations. He entered the FBI as a Special Agent in 1951.

EDUCATION

Mr. Harward was trained in electrical engineering for three years at Cornell and Northwestern while in the U.S. Navy V-12 program. He was commissioned after graduating from the U.S. Naval Reserve Midshipman's School at Columbia University, New York. He has received a B.S. in Mathematics from Wilson Teachers College, Washington, D.C., and an M.S. in Forensic Science from George Washington University, Washington, D.C. In addition to various in-service and specialized training programs within the FBI, Mr. Harward has taken courses in electronics and psychology at the U.S. Department of Agriculture Graduate School, self-study courses in integrated circuits, technical and integrated security, locksmith and alarm system courses offered by the Associated Locksmiths of America.

FORENSIC BACKGROUND

Mr. Harward has worked for over fifteen years in the fields of electronics and acoustics while assigned to the FBI Laboratory.

He conducted examinations in research relating to magnetic tape recordings, speech characteristics and acoustic phenomena, various electro-mechanical, telephonic, toll fraud and audio interception devices. He pioneered in the FBI Laboratory the application of the sound spectrograph and spectral analysis techniques to forensic problems of speech analysis, speaker identification, and analysis of tape recordings. He has conducted hundreds of examinations of evidence submitted in criminal investigations in the above fields.

He has testified as an expert witness in state and federal courts in California, Georgia, Indiana, Louisiana, Mississippi, Pennsylvania, South Carolina, Texas, Virginia, West Virginia, and Wisconsin. He has been accepted as an expert in the fields of acoustic, audio, electronic and engineering analysis. He served as a scientific consultant to the National Commission for the Review of Federal and State Laws Relating to Wire Tapping and Electronic Surveillance (Commission Studies, April 1976). He is a member of the Audio Engineering Society, the American Society for Industrial Security and the Association of Locksmiths of America.

Letter of Ogden N. Lewis to The Honorable Norma Holloway Johnson Dated June 9, 1983

DAVIS POLK & WARDWELL
1575 I Street, N.W.
Washington, D.C. 20005
202-789-7100

(Letterhead Abreviated in Printing)

June 9, 1983

Honorable Norma Holloway Johnson
United States District Judge
United States Courthouse
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Johnson:

Today Merrell Dow Pharmaceuticals Inc. announced that it will stop production of Bendectin. It reached this decision for non-medical reasons. It will continue the availability of the drug for patients already using it.

The defendant has authorized me to communicate this information to you and to plaintiffs' counsel in this case. I enclose

herewith a copy of the intended news release and the documents which will accompany it.

Respectfully yours,

/s/ OGDEN N. LEWIS
Ogden N. Lewis

Encls.

cc: James G. Butler, Esq.
Allen T. Eaton, Esq.
Wiley A. Branton, Jr., Esq.
Jacob A. Stein, Esq.
Cohen & Kokus

News Release Annexed to Letter of Ogden N. Lewis Dated June 9, 1983

Merrell Dow

MERRELL DOW PHARMACEUTICALS INC.
Subsidiary of The Dow Chemical Company
Cincinnati, Ohio 45215, U.S.A.

Telephone: (513)948-9111
Telex: 214320

NEWS RELEASE

FOR IMMEDIATE RELEASE:

CONTACT: Bill Donaldson
(513)-948-7859
(513)-561-8721

WASHINGTON, D.C., JUNE 9, 1983—The production of Bendectin, the only U.S. approved drug for relief of nausea and vomiting of pregnancy, has ceased in the United States of America and world-wide according to its maker, Merrell Dow Pharmaceuticals Inc.

David B. Sharrock, President of Merrell Dow Pharmaceuticals—U.S.A., (an operating unit of Merrell Dow Pharmaceuticals Inc.) today emphasized to a Washington, D. C. press conference that, "patients who have taken or are taking Bendectin during a current pregnancy should not be alarmed by our action." In explaining that the company's action was based solely on non-medical reasons, he described a national information system instituted for physicians and pharmacists to receive information which will help them answer inquiries from patients.

Merrell Dow is stopping production, "with great reluctance," Sharrock said. Bendectin has been, "tested extensively and used safely for 27 years in more than 33 million pregnancies. The overwhelming majority of independent experts, plus regulatory and health agencies throughout the world agree that the available medical evidence does not demonstrate a cause and effect relationship between the use of Bendectin and birth defects." He commented further that in spite of this support, significant adverse publicity has continued to surround the product.

Sharrock added that Bendectin is, "a victim of these litigious times. Although we have absolutely no doubt of its safety and effectiveness, the burdens of continuing to market Bendectin have become just too heavy. Unfortunately, these burdens have fallen on physicians, pharmacists, and patients, in addition to the company."

The defense of Bendectin has caused a significant drain on the manpower and other resources of the company. "If Merrell Dow is to continue to pursue its mission—the development of new and improved drugs for patients here and around the world—we must, sadly, stop production of Bendectin," Sharrock said.

Reflecting its concern for the impact of this decision upon patients who have taken or are taking Bendectin for current pregnancies, Merrell Dow has instituted a three-part program.

Effective today, the company is:

1. Advising physicians and pharmacists that patients now taking Bendectin can complete their therapy.

2. Advising customers that Merrell Dow will offer a program for handling unused stocks of Bendectin.
3. Answering all physician and pharmacist questions via a toll-free information number.

Approved in the U.S. in 1956, Bendectin is the most tested drug for use in pregnant women.

In 1980, a U.S. Food and Drug Administration's panel of experts, the Fertility and Maternal Health Drugs Advisory Committee, concluded that present evidence does not demonstrate an association between Bendectin and an increased risk of human birth defects.

"I think there is a lesson in this for all of us," Sharrock concluded. "America is a litigious society. Unfortunately, consumers—the ultimate beneficiaries of drugs—will increasingly see the real cost of defending products against unsubstantiated claims. In fact, as in the case of Bendectin, such claims can ultimately deny the public use of needed therapy."

Excerpts from United States District Court for the District of Columbia Order To Show Cause Hearing Transcript of June 21, 1983

[11] * * * * THE COURT: Well, let me say before you get off this matter, you are certainly entitled to your views on that, but I still am firmly of the opinion that her credibility is not **[12]** at issue here, but you are certainly welcome to bring her.

Now, I think the defendant would like to say something about the motion, and let me hear that before we get to your next point.

MR. STEIN: Before I leave that point—

THE COURT: You are still on that point, okay.

MR. STEIN: If it's your honor's resolution of this issue that her testimony is irrelevant, then we are bound by that.

THE COURT: Let me say this. I am not saying that her testimony is irrelevant. I don't know what you want to get from her, but I just said to you that with respect to your view

that the way I have framed this rule to show cause, the lady's credibility is at issue. I said I don't think her credibility is actually at issue, unless you bring her here and there is some issue of credibility. But I am concerned with why Mr. Allis did this act, not whether Mrs. Janowski was telling him the truth or not, but why he did what he did. * * * *

[15] THE COURT: * * * *

I can understand how you as counsel for the plaintiffs have had an opportunity to consider all of this, review all of this and come to those conclusions. But, as I said, I still believe, as I have maintained throughout these hearings that I have conducted on these side issues, as I choose to call them, that the issue of the credibility of Janowski is not before me. But, as I said, if you think and if it is your theory that her credibility is there and you want to put her on the witness stand, I would think that the way for you to do that is simply ask me to try to get her here. * * * *

[17] MR. COHEN: * * * *

For example, the request for Janowski, there were five days of cross-examination of Ms. Janowski by Mr. Stein's clients out in California. That record is part of this record. It could easily be transferred if it was relevant. It's not relevant.

Ms. Janowski has gone through seven-and-a-half days of under-oath testimony. And I just don't see, and Your Honor specifically stated, that her credibility is not relevant, because the effect of what Mr. Allis did was to destroy Ms. Janowski's credibility, regardless of the truth or falsity of the statement, and it was to prevent this Court from following up and ascertaining whether the statement was true. That is the issue. The issue isn't whether what she said was true. The issue is when a witness has something to divulge in a **[18]** court proceeding, no one has the right to suppress that, whether she's telling the truth or not, and you have told that to Mr. Stein and his clients on at least five or six different occasions and they keep coming back and they keep saying her credibility is the key to this. * * * *

[30] * * * * MR. STEIN: I wonder if it would be possible for the defendants to advise the Court whether they intend when this **[31]** case is tried to call Ms. Janowski.

MR. WALSH: Your Honor, I can speak to that because I've given it a lot of thought. I simply don't know. It's perfectly clear to me what's going on. The plaintiffs deposed her at great length and took her through all of her problems on the deposition. They have done the same thing and just finished yesterday in the unemployment insurance hearing in the dispute over her unemployment insurance claims. Mr. Dan has cross-examined her over the same material that Mr. Coleman took her through and had the advantage, of course, of Mr. Coleman's prior deposition to help him.

Now, this is going to be a third time, and by the time they get through cross-examining Ms. Janowski, whether he does it under direct and claims she's a hostile witness or whatever the format is, she is going to have been examined three times over this material, and it is impossible for me now to know what is going to be left. But as far as we are concerned, they began on the morning of the 27th to destroy Ms. Janowski's credibility and this is just a continuing effort. • • • •

Excerpts from United States District Court for the District of Columbia Order to Show Cause Hearing Transcript of June 30, 1983

[97] • • • •

NICHOLAS R. ALLIS, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

Q. Mr. Allis, are you admitted to the bar of this Court? A. Yes, I am.

Q. When were you admitted? A. I believe it was April 23, 1971. • • • •

[98] • • • • Q. In evaluating the statement, I'm going to ask you what weight you gave to the following items, all right? A. Yes.

Q. What weight did you give to Mr. Daum's statement? A. I gave it weight.

Q. To the factor of Barnes in the case? A. I gave it weight, because a rear admiral had filed an affidavit indicating that Mr. Barnes had in essence said that he would be willing to pay money to get Mr. McBride, Dr. McBride, one potential expert in Australia.

I also had information that Barnes had been rummaging around in court records of our experts in towns far away from Los Angeles.

So that the information that we had about Barnes led me to believe that he was capable of the type of activities that Ms. Janowski was describing.

[99] • • • • Q. What part did the statements of your client have in your evaluation? A. It played a great part in my evaluation.

Q. In what way? A. Mrs. Koller had testified several times about her **[100]** ingestion of Bendectin and had testified under oath. I knew that Mrs. Koller was an exceptional person who had gone through schools and colleges on scholarship and had risen to the rank of captain in the United States Army, had not just good but outstanding character and work recommendations in her military history, was head nurse of one of the entire wards at Walter Reed, was a devout Christian, was now working as a nurse at the City of Faith Hospital in Tulsa and very active in that particular religion that that hospital is associated with. She is a person of the utmost, highest character.

In addition to that, the medical records showed and contained an entry by a doctor. I believe his name was Dr. Hanson. That record on the day of the child's birth said that Mrs. Koller said the only thing she took during the first trimester was Bendectin.

It is ludicrous, in my mind, to think that a person would say that she took Bendectin during the first trimester on the day of her child's birth in contemplation of any lawsuit against the maker of that drug.

In addition, at the very end of the first trimester, she went in for her first private visit with a physician, with an obstetrician. That physician, Dr. Stone, has testified and before that had

said that when Mrs. Koller came in to see him for the first time, she was already taking Bendectin, and that's what he put down in his medical chart. **[101]** She was using Bendectin. He testified that she already was using it and had obtained it from another source. • • • •

[102] Q. What effect did it have on you that she stated that the other side had the floor plans to the firm and there was a question of whether the files were fireproof? A. I gave it great weight. I asked and talked about—with Mr. Butler on the 27th, Monday, about whether we should change the locks on our offices because they had the floor plans of our office and asked whether the files were fireproof. In fact, we did get a locksmith that Monday who changed all of the locks in the office.

I also talked with people in the office about whether we should make copies of all of our files and have them put in some safe place.

I did that because I believed Ms. Janowski, not a hundred percent, but I tended to believe her. I had no reason to doubt her, and my reaction was to on balance believe her and act on it.

I thought that this is another indication of what Barnes is doing. It seems in line with some of the activities we've heard about, although taking it a step further, going further. It seemed to me that it made her story about her being bribed and threatened to sign a false statement even more plausible. These were just steps in a line. They had floor plans. They asked whether our files were fireproof. They went on and actually tried to importune an employee of our office.

[105] • • • • Q. Why didn't you put in the statement that she had both communicated with Davis Polk and had also told them that the case was a fraud? A. I did not put that in the statement because she had denied that, and I assumed that since she had denied it, she wouldn't sign it. • • • •

[106] • • • • Q. After making your evaluations, what was your opinion **[107]** as to whether there was a basis for believing Ms. Janowski's statement that she signed? A. I believe that there was a good basis for believing it to be true, and Floyd

Humphries and I left her apartment thinking that everything she said was true.

Q. When did you receive the Davis Polk letter? A. Tuesday, the 28th. • • • •

[111] • • • • Q. Did she ever tell you during the month of December 1982 that Mr. Schuck was her lawyer? A. Durin the month of December?

Q. Yes. A. She never told me that Schuck was her lawyer. • • • •

[114] • • • • Q. Did you tell Ms. Janowski at her apartment that you were interested in and wanted a fuller statement?

A. I certainly did.

Q. Is that reflected on the tape? A. It is. • • • •

Cross-Examination by Mr. Cohen

[155] • • • • Q. Would Mr. Humphries also be mistaken if he testified under oath that the principal reason that you were going to Janowski's apartment that evening was to get a written retraction of what she had told Davis Polk? A. He would be mistaken, and he didn't—what he said was that it was more of an affirmation. That's what we were getting. But, of course, if our suspicions were in any way true, to that extent it would be a retraction. But as far as the topmost reasons why we went out there, they had nothing to do with a retraction. It was to get an affirmation of what she was saying. • • • •

[156] • • • • Q. And didn't you just state under oath that you got this statement and you didn't intend to give it to the Court? **[157]** A. That is correct.

Q. So, therefore, your statement wasn't for the purpose of reporting it to anyone, was it, sir, that signed statement you got from Janowski? A. My—I didn't even think when I got the statement whether or not it would one day end up being given to the Court or one day end up being introduced into evidence in any forum.

My thought when I got that—brought that statement out to Janowski, which was based on what she told me previously,

was simply to get on the record what she had been telling Mr. Daum and me, to see if she repeated that to Mr. Humphries. She did repeat in the presence of Mr. Humphries what she had told me previously and Mr. Daum previously. I wanted to get it on the record particularly if she went to Mexico, and, secondly, I wanted to see if she would sign it, because it would be a further indication that it was the truth.

In my experience, once in a while you will have a witness who will say something, but then when you present them with a statement and it's a more formal thing, they feel—all of a sudden they won't sign it.

So, the fact that she would sign it would be a further indication of its truthfulness to me. So, these are the paramount things that were in my mind when I went out to get the statement.

[175] • • • • A. I always thought that they were trying to bribe her and threaten her. The only thing I had a suspicion about was whether she had led them on. Even if she had led them on in some innocent way, it would be wrong for them to bribe and threaten her, which is what she said that they were doing.

So, I always believed that they were offering her things, offering her the comfortable apartment and to take care of the wants and needs of her child. That would be the way that I was thinking of it, not using the word "bribe," but offering her things and threatening her. • • • •

[176] • • • • Q. You didn't intend to share this statement, because I understood your testimony under oath was you did not intend to show this confirmation to anyone; is that correct? A. Well, what I—I wasn't thinking about how it would be used in the future, not that I was intending any particular **[177]** use of it. I was not intending any particular use of it. I wasn't thinking of what use I was going to put to it. I was hoping, I suppose, that now that she has come back to us and told us what the facts are and so forth, that in some way, shape or form this could come out and help Mrs. Koller. • • • •

DAVID AUSTERN, called as a witness by the plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

[188] • • • • Q. Would you tell the court your background and training as a lawyer, with particular emphasis on matters dealing with ethical considerations. A. I graduated from law school in 1964. I spent three-and-a-half years as an assistant district attorney in the New York County District Attorney's office and five years as an assistant United States attorney thereafter in the United States Attorney's Office for the District of Columbia.

Q. Where did you graduate from law school? A. Yale. I spent slightly less than one year as a legal advisor for the mayor of the District of Columbia. I then served for about the same period of time as bar counsel to the Board on Professional Responsibility of the District of Columbia Bar, and I went into private practice about ten years ago.

I spent thereafter three years as a member of the Board on Professional Responsibility and a year or two on the Legal Ethics Committee of the D.C. Bar.

I have taught legal ethics at Georgetown University Law School for approximately ten years and also at the American University Law School for three or four years.

I give continuing legal education courses in legal **[189]** ethics for practicing lawyers for the American Bar Association and also for Georgetown University. I am the bar lecturer on legal ethics for an organization which instructs people on passing the bar in this jurisdiction and a number of other jurisdictions. I am the Bar Examiner for the National Board of Trial Advocacy on Legal Ethics in criminal law and civil law.

I spend about one-third of my practice defending lawyers before either disciplinary commissions here and elsewhere or in malpractice litigation.

There may be some other issues, but I'm not quite sure that I can recall them now.

Q. Have you lectured at the invitation of law firms in the District of Columbia on legal ethics? A. Yes, I have.

Q. Have you made studies and reports as an expert on legal ethics? A. I have on five occasions now served as a consultant to or been the director of reports dealing with the conduct of attorney disciplinary proceedings or the application of the Code of Professional Responsibility to those proceedings here and elsewhere.

Q. In preparation for your testimony here today, what have you reviewed? A. I have reviewed the transcripts of the proceedings **[190]** thus far—well, let me say, through March 16th. I believe there was some character witness testimony I did not review which came thereafter.

I have reviewed the letters which were sent to the court by the Davis Polk firm on December 27th and by the Butler firm on December 28th, as well as the attachment to the latter.

I have reviewed the transcript of a tape recording which I understand was prepared by the defendants of an interview with Mr. Allis' secretary that took place the night of December 27th.

I have reviewed a number of affidavits that have been proffered.

I have reviewed an Unemployment Compensation Board memorandum from the California Unemployment Compensation Board.

Q. Have you reviewed the statement itself taken on the—

A. Yes. That was an attachment to the December 28th letter. I have reviewed that.

Q. And you were present during the testimony of Mr. Allis this morning? A. Yes, sir. • • • •

[192] • • • • Q. Does the fact that the lawyer's fees were paid by the firm that selected him have any ethical consequences?

MR. COHEN: Excuse me, Your Honor. I will just make this a continuing objection. I am objecting to all of the questions and answers and moving that it all be stricken on the ground that they are assuming facts not in evidence, and also on the ground that some of the facts are improperly stated.

I would just like a continuing objection and continuing motion to strike.

THE COURT: I don't even think that issue is before me. I don't think the issue is before me in this hearing as to whether or not the conduct of Davis Polk was ethical. • • • •

[199] • • • • Q. Do you have an opinion as to whether Nicholas Allis had an ethical obligation to obtain a statement, if possible in writing, from Krystyna Janowski on December 28, 1982? A. I do.

Q. What is your opinion? A. He would not be representing Mrs. Koller competently **[200]** as required by DR 6-101, or even zealously, as required by DR 7-101, unless he in fact got a written statement from her. • • • •

[201] • • • • Q. Let me ask it again. Do you have an opinion based on ethical considerations concerning the propriety of enclosing Ms. Janowski's statement with the letter sent by the Butler firm to the Court on December 28, 1982? A. I do.

Q. And what is that? A. It was not only proper to enclose it, I think it would be improper to exclude it from the letter.

Q. Why is that? A. It was the only, as far as I know from the record, the only written statement that existed in which Ms. Janowski, as of December 28th, had stated what I believe to be the crucial and operative issue in the statement that she signed.

Q. And what is that issue? A. That she had never said to anybody that the plaintiff had not taken Bendectin during the first trimester of her pregnancy.

Q. Why do you see that as the substantive issue? **[202]** A. Well, for several reasons. First of all, Mr. Allis had a duty to ascertain whether the suit was worthless and, indeed, under DR 2-110, if he reached the conclusion that his client was committing a fraud on the court in terms of the prohibition that you cannot sue people for sport, he would be, at least at that stage, required to withdraw. It would be a mandatory withdrawal.

Second, irrespective of whether it's a mandatory withdrawal, it seems to me that when the attorney, under the broad provisions of Canon 7 that fraud not be committed on the court, learns that someone may have said something like that, the attorney has a duty to investigate, and that was the operative issue.

Indeed, had the Janowski statement been limited to that, it seems to me that would have fulfilled the ethical obligation of Mr. Allis and his partners. * * * *

[208] * * * * Q. All right. You said you had an opinion concerning the propriety of continuing the employment of Ms. Janowski **[209]** with the firm after December 27th? A. I do.

Q. What is your opinion? A. It was proper.

Q. Why do you feel it was proper? A. DR 7-109 speaks to giving money to witnesses or, for that matter, anybody else—I think a witness is the applicable word here—in order to influence testimony, or for any other purpose.

Ms. Janowski, of course, was an employee of the firm. I think it would be wholly proper to continue her as an employee of the firm, I might add, not indefinitely, but wholly proper in the period of time in which we are talking about to permit her to remain as an employee of the firm.

Let me say that that would be, I suppose, doubly so if Mr. Allis believed what she said in her statement on December 27th.

Second, I think it was not only proper but probably required to remove her from the office, at least until one had gotten to the bottom of the facts, and having her work at home, I don't know that I would have thought of it, but is a happy solution.

When you've had what is ostensibly a Canon 4 breach, a breach of confidences by an employee, it's not only prudent but I think the code would require that you find some way for **[210]** her to work so that she does not have access to the files in the case, at least temporarily.

MR. STEIN: Would Your Honor indulge me for a moment?

THE COURT: Absolutely.

Q. Of what relevance is it, looking at this as an ethical matter, of whether Mr. Allis had a reasonable basis for believing Mrs. Koller when he found himself in the quandary we are discussing? A. Well, it is relevant that he believed her. He has to pursue the interest of his client. He's mandated to do that.

Q. At what point could he give up the interest of his client?

A. I think he would need very close to—I was about to say overwhelming, but I guess that's not a helpful legal principle. I think he would almost need proof beyond a reasonable doubt that his client was lying before he could have a mandatory withdrawal, or perhaps considering, as I understand the preparation of this case, even a permissive withdrawal.

Q. Do you have an opinion as to whether Mr. Allis, from an ethical point of view, acted improperly in this case? A. I have an opinion.

Q. And what is it? A. He did not act improperly.

[213] * * * * Q. Do you have an opinion as to whether the tape-recording of it under the circumstances as testified to by Mr. Humphries and Mr. Allis, whether that was improper? A. I do.

Q. What is your opinion? A. It was not improper.

Q. Why wasn't it? A. Well, whether you have a violation of the Code of Professional Responsibility here is about 90 percent a function of state law, and I have read a memorandum with respect to what the state law is in this case, and first based on that, as long as you're not committing a crime under California law, I think that what happened here was quite proper.

Let me also say that the California statute which speaks to bribery and corruption attempts permitting tape-recording is perhaps the second 10 percent of that. In any event, it is not a violation of the Code, because the Code leaves it up to the individual states, if you will, to apply the Code based on state law.

I would say that there is an opinion of the American **[214]** Bar Association which speaks to surreptitious recording. It is discouraged. It does not have any effect on the Code, and it speaks mostly to two types of situations not relevant here. One

is telephone conversations with other attorneys, and the other is when you are in a settlement conference with an attorney and tape-recording such settlement conferences.

Q. Do you have an opinion as to whether it was improper for Mr. Allis to try to head off or at least to contain the threat to his firm's case that was posed by Ms. Janowski's becoming a witness for the other side? A. I do.

Q. And what is your opinion? A. He had an ethical obligation to get a statement from her.

Q. To head that off? A. Yes. * * * *

Cross-Examination by Mr. Cohen

[235] * * * * Q. All right. Now, let's talk about tape-recordings. You mentioned the ABA. Isn't the ABA prohibition against surreptitious tape-recordings without the knowledge of all the parties mandatory? A. Mandatory?

Q. In other words, doesn't the ABA say, "The conduct prescribed in DR 1-102(A)(4), that is to say, conduct which involves dishonesty, fraud, deceit, or misrepresentation, in the view of the committee clearly encompasses the making of recordings without the consent of all parties?"

Now, don't they say that, sir, and doesn't that seem like they are saying if you do what Allis did, that's clearly a violation falling within the conduct which involves dishonesty, deceit, and misrepresentation? A. ABA opinion 337—I think that's it, or perhaps—

Q. Yes. A. 337 has no binding effect in the District of Columbia. * * * *

Redirect Examination by Mr. Stein

[240] * * * * Q. I take it what you're saying is that if I give a witness ten dollars in order to influence their testimony, that would be an ethical violation? A. It would be if you gave them ten dollars to influence their testimony?

Q. To influence their testimony. A. That would be an ethical violation.

Q. You have already testified that given the fact that she was still their employee that it was not an ethical violation to continue her salary; is that correct? A. That is correct.

Q. Was there an ethical obligation to report the facts and circumstances to the Court on December 27th by the Butler firm? A. No.

Q. Considering ABA Opinion No. 337 and anything pertinent thereto, was the surreptitious tape-recording unethical? A. No.

[241] Q. Suppose that Ms. Janowski had told Mr. Allis that she had contacted Davis Polk and said the case was a fraud, step one. Step two, she says that when she told them that, she was not telling the truth. When she made that statement to Davis Polk, she did it for reasons of spite because she didn't like the law firm and it was untrue and she regrets it. And Mr. Allis were to take a statement which says in it that if she were to make a statement discrediting the Koller case, it would be untrue, would the taking of such a statement, based upon the circumstances I have given you, be improper? A. Again, it would not only not be improper, it would probably be required.

Q. Would the fact that the statement omitted the antecedent part, that is, she had made a statement which was untrue but regretted it, if that was omitted and the balance was included, would there be anything improper about getting the witness to sign that kind of statement? A. No.

Q. And why do you say that? A. The important thing is to get the witness's signature on the statement, and, again, the omissions or commissions become irrelevant for ethical considerations once you get the signature on the statement as to the crucial facts. * * * *

[243] * * * * Q. As part of your practice, have you given lectures and advice to investigators concerning the manner of taking statements? A. Yes.

Q. When you gave those lectures and gave that advice, did you have in mind ethical considerations surrounding the taking of statements? A. That's why I was giving the lectures.

Q Is there anything about the way Mr. Allis took this statement which offends any of the ethical considerations that you are aware of? **[244]** A. No. • • • •

Re-Cross Examination by Mr. Cohen

[245] • • • • Q. I would like to show you a copy, if I may—may I approach the witness?

THE COURT: Certainly you may.

Q. —Of Judge Johnson's order to show cause, and I would like you to read, and I will read along with you, paragraph two, which is very brief, and then I will ask you the question.

I want you to assume the following fact is true: I want you to assume that Nicholas Allis prepared and obtained a statement from Krystyna Janowski retracting her previous statement to the defendant that the instant case was fraudulent without regard for the truth of Ms. Janowski's retraction, in an apparent attempt to protect the Butler firm's financial interest in this and other related matters by thwarting any further investigation into the circumstances surrounding and the basis for Ms. Janowski's original statement.

Now, assuming all of that is true and has been found **[246]** as a fact by a fact finder, would that be a violation of ethical duty? A. A number of different things, assuming they're all true, would be a violation of ethical duties.

Q. Just spell out the different things so we have a record. A. Let me start with thwarting the investigation. If an attorney sets out to deliberately fraud the court, which is what I read thwarting the investigation to be here, that would be a violation of Canon 7, particularly DR 7-102.

If you take a statement from a witness, knowing that statement to be a lie, I think you have probably violated several different provisions of Canon 1.

If you try and influence the witness, and I am using the interest of the Butler firm in the financial statements to be a violation of DR 7—well, let me back off and put it this way.

If your financial interest becomes the most important thing in the world, you are not serving your client, and that would be a violation of Canon 6. • • • •

[252] • • • • THE COURT: I will ask you your last question, the one you want to answer about the conflicts position.

THE WITNESS: I do want to answer that.

I think D.C. law is applicable here. I don't think it's a function of where the attorney practices law. I think it is a function of where the court is located, particularly when there are Canon 7 allegations of fraud on the Court.

THE COURT: All right. And D.C. law is what?

THE WITNESS: Well, you can certainly take tape recordings in the District of Columbia.

THE COURT: Surreptitious?

THE WITNESS: Well, let me back off and say there's a federal statute about cutting, breaking, tapping or connecting to a telephone line, wire, cable or instrument, but otherwise you can—I mean, you can't do that here, and you can't do that under federal law either, and the ABA has had some things to say about it. But, yes, surreptitious **[253]** tape-recording would be all right. • • • •

THOMAS LUMBARD, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Stein

Q. What is you profession, Mr. Lumbard? A. I am an attorney-at-law and right now I'm a visiting Associate Professor of Law at the California Western School of **[254]** Law in San Diego, though I practice law here in Washington.

Q. Where did you receive your college degree? A. Harvard College in 1959.

Q. Where did you receive your law degree? A. I received an LL.B. from the University of Pennsylvania in 1963.

Q. What courts are you admitted to practice in? A. In this court, in the United States District Court for the District of

Maryland, the Court of Appeals for this circuit, the courts of the State of New York and the District of Columbia.

Q. Have you published any books or articles in the field of professional responsibility? A. Yes. There are two law review articles, both published in 1981, one in the Catholic University Law Review early in the year, and one in the University of Bridgeport Law Review at the end of the year, both dealing with the field of professional responsibility and legal ethics generally, and particularly with various proposals to amend the Code of Professional Responsibility, the latter one I think particularly with the proposed confidentiality provisions of the so-called Kutak Rules.

Q. Did you write an evaluation of the proposed Code? A. Well, I wouldn't call it an evaluation. I was a consultant and associate reporter and then reporter to the **[255]** Commission on Professional Responsibility of the Roscoe Pound American Trial Lawyers Association, which produced what is called the American Lawyers' Code of Conduct, an alternative proposal to the so-called Kutak Rules, and particularly I was the reporter for the last draft of that so far that have been published and I was wholly responsible for drafting for that a proposed revision of the present Code of Professional Responsibility reflecting the substance of the completely different formated code of the Pound Foundation Commission.

Q. Have you lectured on legal responsibility? A. Yes. I have lectured to the—what is called? The Society for Christian Ethics on problems of—well, trends in the Law and Professional Responsibility in January of 1982, and I spoke twice to the annual American Bar Association Workshop on Professional Responsibility which is held every June in Chicago, once on federal agency jurisdiction to discipline attorneys and the second time at a panel discussion which was chaired by Chairman Kutak of the Kutak Commission, and the other speakers were members of that commission, the reporter of that commission, and a professor from the University of Indiana Law School. It was a symposium on the rules and I particularly addressed the confidentiality provisions, but I attacked them in general.

Q. Have you taught legal ethics? A. Yes. I've taught at—well, I gave a couple of **[256]** guest lectures at American University and at the Potomac School of Law, and then I taught—I followed Mr. Austern on the rostrum at the George Washington Unversity program for paralegals, and then I've just this summer been teaching professional responsibility at the California Western School of Law in San Diego. • • • • **[257]** • • • • Q. What matters have you reviewed in anticipation of testifying in this case? A. Well, I have reviewed the record in this proceeding. That is, the disqualification proceeding, as I understand it. And I would have to refer to my notes specifically. I started with the proposed findings of fact that were submitted by both sides, given the nature of the proceeding, giving primary consideration to the findings that were submitted by the defendant.

I examined the letter written by Mr. Ogden on December 27th; the letter written by Mr. Butler on December 28th; the statement signed by Mrs. Janowski on December 27th; the document described in her handwriting as "the conversation they want me to recall having."

I examined both transcripts of the tape recording of the interview of Mrs. Janowski by Mr. Humphries and Mr. Allis **[258]** on December 27th, and I've also examined a very small portion of the deposition of Mr. Allis and all of the transcript of the evidentiary hearing before Judge Johnson in March.

I was in the courtroom on the 31st of May and I was here for part of Mr. Allis's direct examination this morning.

Q. Based on what you have reviewed, do you have an opinion with respect to whether Nicholas Allis acted improperly in what he did when he went to Krystyna Janowski's home on December 27, 1982, including the taking of the statement and the content of the statement? A. Okay. Well, my conclusion, based on what he did, the apparent purpose of what he did, what was said, which was to get on the record what she was saying, is that what he was doing was not improper. • • • • **[261]** • • • • Q. Let's turn to the taping of the conversation. Was there in the language of the canons a reasonable expecta-

tion of confidentiality on the part of Ms. Janowski? A. Not in the instance of a conversation with two other people. I mean, this is the classic instance where if she has a privilege and she's talking in the presence of a third person, the privilege is waived. And it's the classic instance of where, no, there is not an expectation of **[262]** confidentiality. Certainly here she knows who Humphries is. She knows that Humphries is a licensed private investigator, and she knows that when she's talking to Allis in the company of Humphries that she's talking to a third person who has been brought in for the purpose of investigating.

Q. What effect does the presence of Humphries in what you have just said have on the ABA Opinion 337? A. Well, 337 is a little bit peculiar. 337 is, I think, a Watergate era aberration and it's the only ABA Opinion which does not lean very heavily on the question of the confidentiality of the communication or the expectation of the person being recorded that the conversation is private.

I think 337 is an aberration, and indeed, the New York Opinior which predates 337 goes back toward the former analysis.

I prefer the analysis in the earliest Los Angeles Opinion on this subject, which is to some extent followed by the more recent Los Angeles Opinion.

Q. And what is that? A. Well, it's essentially looking at the circumstances of the conversation and looking at whether there is an interest to be served by recording which is a proper interest and which is an interest which the lawyer needs to follow to protect the interest of the client, and it's not a question of the lawyer. That seems to follow very much in this situation.

[263] The first LA Opinion came out before the—the FCC Regulations were applicable to both intrastate and interstate telephone communications, and, therefore, there was a discussion of whether—this was basically centering on telephone recording, and because of the date, you're dealing with recording by phonographic means rather than electronic means. The opinion at that time draws a parallel between recording and

having someone else take shorthand notes of the conversation.

That committee found that occasions which arise where it would be appropriate to record telephone conversations without the knowledge of the other person for the purposes of protecting the rights of the client, the attorney's own rights and avoiding—well, securing evidence of the commission of crime, which certainly was a possibility in this instance.

One of the things that no one seems to have thought about in this case is what happens if she doesn't sign the statement; what evidence is there, other than a swearing contest, as to what happened and what she's talking about and whether she told anybody that these people are apparently attempting to suborn her in one way or another, and that scenario could not be predicted when they went to her apartment. They couldn't predict she was going to sign anything or give them anything.

Q. What are the ethical implications of what you have **[264]** just described? A. It's trying to catch a bird on the wing, and in this instance about the only way to do it would be with a recording, really not knowing which way this woman was going to jump.

Q. Would it be improper for a California lawyer to record a conversation in California without the knowledge of one of the participants if he reasonably believed that making that record was not forbidden by either state or federal law? A. Not under the California Rules of Professional Conduct, which are somewhat different, and not under the ethics opinions of the various California Bar Associations.

Q. Would such an undisclosed recording of conversation be proper under California law? A. Under the circumstances in this case, yes.

Q. Are you familiar with the misdemeanor statute dealing with a recording of conversations in California? A. I have read it. I would not say I was familiar with it.

Q. Have you taken that into consideration in giving your opinion? A. Yes, I have. It differentiates between one—there is whether the conversation is confidential, and then there is also the exception for even of a confidential communication for purposes of the detection of enumerated crimes.

[270] • • • • Q. The Butler firm was confronted with a situation of an employee who had had contact with the other side. Have you looked into the matter of the way they disengaged from such an employee and do you have an opinion as to whether the way they disengaged from her presented any ethical problems?

A. Well—

MR. COHEN: Your Honor—

THE COURT: Just one moment. There is an objection on the floor.

MR. COHEN: Excuse me, Your Honor. We are cumulative again here, Your Honor. I distinctly remember cross-examining Mr. Austern. I remember his direct examination testimony on this very issue.

Unless Mr. Lumbard has something very new and startling to say, I think it is cumulative.

THE COURT: It does appear to be cumulative to me.

MR. STEIN: I think he has an observation to make [271] which is different than what Mr. Austern made on this point, and I am getting to the end of his testimony.

THE COURT: Of course, I'm not saying that he doesn't have something different, but the fact of the matter is you present whatever expert opinion you wish, and I don't know why you should present two, but I will permit Mr. Lumbard to answer.

Don't worry about the time. I've got the time.

THE WITNESS: Well, it may have been happenstance, but in my opinion, they probably hit upon the ideal way of handling this rogue elephant.

THE COURT: What is a rogue elephant?

THE WITNESS: Rogue elephant, loose cannon, whatever language you want to use.

THE COURT: All right.

THE WITNESS: I would state that they had an obligation under the circumstances not to let her into the office. She was a quisling or seemed to be a quisling. There was enough likelihood that she might be about to betray

confidences of client, perhaps because of her mental state at the time, that to keep her out of the office where she did not have contact with any confidential materials that she could betray and yet to be able to keep her on this rather vague sort of compassionate leave that she was on at the time because of the birth of this prematurely born child seems to have been [272] an ideal situation.

They weren't sort of cutting her loose and, on the other hand, they were avoiding the major problem, which they were required by the Code to do, to prevent the betrayal of the confidences of client by this person who appeared to be likely to do that. • • • •

[273] • • • • MR. STEIN: The question would be: Was it ethical for the Davis Polk firm not to report to the Court a conversation which was had with Ms. Janowski, "How about a bribe? How about you guys bribing me?"

THE COURT: First of all, I would keep that out, and I won't even let you give me his answer because it occurs after the date and time I am concerned with. So, I would keep that out on that basis.

MR. STEIN: I understand, Your Honor, but my proffer is—

THE COURT: Your proffer I don't want, because I would keep it out because it's outside of the scope of the time frame. So don't even tell me what Mr. Lumbard would say for the record.

MR. STEIN: Is Your Honor—

THE COURT: I am ruling that you may not tell me what his response would be. Yes, that's what I'm ruling.

MR. STEIN: Okay. The next question would be: Was it ethical for Davis Polk to have continued seeing Ms. Janowski [274] after their saying she had counsel? And his answer would be that it was unethical.

MR. COHEN: Could I just comment a minute, Mr. Stein? I don't mean to interrupt.

Mr. Lumbard has testified under oath that the only material that he has reviewed has been the material of the evidentiary hearing plus some other depositions.

Now, that's been my involvement in this case, and where Mr. Stein is getting all of this information, I don't know, but it certainly hasn't been in evidence in this courtroom.

MR. STEIN: It—

THE COURT: Please let him finish.

MR. COHEN: I have heard no one testify to that, Your Honor. All I'm saying is how can an expert give an opinion based upon information that is not in the record?

Now, if Mr. Stein can produce that information in the record, then maybe—I don't think it's relevant, but clearly this man hasn't mentioned he read it.

THE COURT: That has not been testified to by anyone in the proceedings that are here under consideration, or that Mr. Lumbard said he has testified to. And, Mr. Stein, I think what I want everyone to be above all else is at least fair here. I don't think that there has been any testimony. There have been a lot of statements by counsel and there has **[275]** been a lot of unresponsiveness by a few others about what Davis Polk did, but what Davis Polk did is not at issue in this proceeding.

You are reading these rules and you are trying to put certain things into evidence. You have put that last answer and proffer in. I will permit that. If you have any other proffers, let me hear your proffer before his proffered answer. Let me rule before you give me his proffered answer, all right.

MR. STEIN: My proffer is—

THE COURT: Let me hear your proffer, and then before you give me his proffered answer, you let me rule as to whether I would even admit it.

MR. STEIN: Was it ethical for Davis Polk to pay Krystyna Janowski, as Mr. Allis testified Davis Polk paid Krystyna Janowski?

THE COURT: I would sustain the objection because there was no testimony that she was paid before the 29th of December.

MR. STEIN: My proffer would be that he would answer—

THE COURT: I am not going to permit it because I wouldn't permit the question. The question is just totally out of the time frame.

MR. STEIN: I have no further questions.

Cross-Examination by Mr. Cohen

[282] • • • • Q. Mr. Austern said it is a violation because of the use of the words "without regard for the truth of Ms. Janowski's retraction." He said that whenever people do that, that is an ethical and a disciplinary violation, and I take it you disagree? A. Well, yes, I disagree because I think Mr. Austern—well, Mr. Austern may have a different view of the purpose for which the statement was taken. I think this is like taking the defendant's statement and getting him to tell you the phony alibi story so that he can't construct another alibi story later. That's essentially what it is.

Q. But you are resisting accepting the hypothetical. The hypothetical says not only was there no regard for the truth of the retraction, but the reason why is it was an apparent attempt to protect the Butler firm's financial interest in this and other related matters by thwarting any further investigation into the circumstances surrounding and the basis for Ms. Janowski's original statement.

Now, assuming that is true, do you have, first of all, any ethical problems with it? A. Well, Mr. Cohen, after that point when you get into this description of motive, yes, I agree with the statement. Yes, that is an ethical violation.

Q. Okay. What specifically does it violate ethically? Can you give us some rules, regulations, statutes? **[283]** A. Well, it's the intention. It's the—well, I think the words are used in one instance, "to conceal that which the lawyer has a duty to reveal." If the lawyer has a duty to reveal—the way I understand your objection to Mr. Stein's last question, you're objecting to any proof of the basis for Ms. Janowski's original statement.

Q. Are you asking me a question or are your responding to my question? A. Huh?

Q. You say there are ethical violations in this. A. Yes.

Q. And it's because of the motivation? A. It's because of the motivation, yes.

Q. So that if Allis manipulated this whole thing to protect his firm's financial interest and got Janowski's retraction without respect for the truth, then in your opinion, because of that motivation, he has violated his ethical duty as an attorney? A. Well, among other things, yes, acting not in the interest of the client but in his own interest.

Q. Is that all? Has he done anything else improper? A. Well, you're talking about the thwarting of the further investigation. I have to say again that I don't see the direct proof of that in this record. Without Janowski as a witness, I don't see that proof. * * * *

Q. Now, if Mr. Allis attempted to thwart an investigation by this Court in Ms. Janowski's statements, did he do or has he done anything improper? A. 'f he was trying to thwart an investigation, yes. * * * *

Re-Direct Examination by Mr. Stein

[288] * * * * THE WITNESS * * * * It seems to me that she is still in the situation where she isn't just talking to Nick. She knows that it isn't just as though she was having a heart-to-heart. That's not Floyd Humphries' function. That's not why he talks to people, and she knows that he goes out and talks to people and submits reports on what people tell him. Certainly that conversation is likely to be reduced to the form of a written report, which might not be the case with her conversation with Allis. * * * *

Excerpts from United States District Court for the District of Columbia Order to Show Cause Hearing Transcript of July 1, 1983

[309] * * * * MR. STEIN: In connection with paragraph numbered one of the Court's Order to Show Cause dealing with the Butler issue, this is an excerpt from the voir dire examination in Oxendine versus Richardson-Merrell, which took place **[310]** on May 3, 1983, and records the Court's questions and counsel's questions concerning whether any of the prospective jurors had heard anything about any newspaper articles. * * * *

[311] * * * * MR. STEIN: On the first point, at the top of page 140, it says, "and I have said to you, we conclude when you remain silent that your individual answer to the question is in the negative."

Then reading down below, "Have you heard anything at all about this case? Have you read anything at all about this case, or have you, for that matter, read anything at all about the drug Bendectin?" And there's silence, and there's the expression, "All right. Thank you very much," and then they move on to another matter. * * * *

[314] * * * * THE COURT: Let me find out—have you finished presenting documentary evidence?

MR. STEIN: Yes, Your Honor.

THE COURT: All right. So, are you saying in effect that you have completed all that you choose to present?

MR. STEIN: Yes, Your Honor. * * * *

[344] * * * * MR. STEIN: Well, what I think I'm clear in saying, Your Honor—if I'm wrong, someone will correct me—there has been the appearance of forthcoming in this case by Davis Polk, but what has not been forthcoming is the precise amount of money that they have invested in Mrs. Janowski. If they say that they can't let her founder because of what she did, there are various ways of dealing with that. One would be good faith and the other would be questionable.

A good faith way of dealing with it would be to get an attorney who has never been in an adversary position with Butler and Allis.

Butler and Allis, as I understand the record, offered [345] to help Mrs. Janowski if Schuck were not the lawyer. They asked for another lawyer. They dispute Mr. Schuck's neutrality and they certainly have a basis for it, and as Mr. Austern said, the selection of the lawyer, the way it was done, raises questions of an ethical nature.

Why don't they come in and tell this Court precisely what money has been paid?

THE COURT: I'm sure they haven't told me because I haven't asked that and—

* * * *

THE COURT: Excuse me. And until I ask them, as far as I know, they have no obligation to do it.

Now, I know you think that they should do it, but it just happens, Mr. Stein, that I think I am the one who is controlling this litigation and not you, all right.

I am certain that if I asked them, they would tell me. They haven't failed to tell me anything to this date that I have asked them to tell me. But I have not asked them, and, as I said, as long as I control and not you, I don't see why they have to feel that they have to come in here and tell me, or to tell you, for that matter. * * * *

Excerpts From Exhibits to Supplement to Testimony of Nicholas R. Allis and James G. Butler Filed August 27, 1983*

United States District Court for the District of Columbia

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

LOS ANGELES OFFICE OF APPEALS

Phone (213) 744-2250

Case No.: LA-7567

Received—AUG 19 1983

Date Appeal Filed:
March 7, 1983

Date and Place of Hearing:
(1) May 25, 1983
(2) June 17, 1983
(3) August 4, 1983
Los Angeles, California

Parties Present:
(1) Claimant
Employer
(2) Claimant
Employer
(3) Claimant
Employer

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* This material was submitted to the District Court after the conclusion of the hearings on the Court's Order to Show Cause.

DECISION OF THE ADMINISTRATIVE LAW JUDGE

In the Matter of:

Krystyna Janowski
419 No. Bixel, #1
Los Angeles, CA 90026

Claimant-Appellant

SSA No. 360-36-8953

Butler, Jefferson, Dan & Allis
626 Wilshire Bl., Ste 914
Los Angeles, CA 90017

Employer

Account No. 105-1550-0

STATEMENT OF FACTS

* * * *

When the claimant learned that she was pregnant she requested a 6-week maternity leave and 2-week vacation that would commence January 1, 1983. However, it was necessary to modify the original planned maternity leave when the claimant underwent a Caesarean section November 27, 1982. A two-and-a-half month premature baby girl was delivered, and the infant was required to remain in the hospital intensive care unit for an extended period of time, while the claimant returned home for further recuperation. The claimant was requested to return to work during the pendency of her own recovery in order to continue with the clerical support for the Koller case litigation and she complied with this request after securing a "waiver of disability" from her physician. The claimant returned to her secretarial duties on Monday, December 13, 1982, after being off work approximately two weeks. The employer agreed to allow the claimant to utilize her remaining maternity leave at a future date when the baby would be released from the hospital. There was no interruption in the

issuance of her bi-monthly paycheck in the amount of $900.00 during her absence from work.

On December 20, 1982, the claimant met with and spoke to an employer attorney that was not primarily involved in the Koller litigation. In this conversation with the attorney, the claimant first disclosed her belief to the employer that the Koller case was fraudulent. She never made any disclosure to her supervisor, Nicholas R. Allis, who was heavily engaged in the litigation or anyone else in the office. According to the claimant, she learned during a telephone conversation on December 1, 1981, that the plaintiff, Cynthia Koller, had not taken the Bendectin during the critical first trimester of pregnancy. However, Mrs. Koller credibly denied any such conversation ever occurred. As explained by the claimant, when she made her disclosure to the attorney on December 20, 1982, he laughed and expressed disbelief of her suspicions with respect to the alleged fraud. During this conversation she requested that her hours be reduced because she believed that she would be less guilty of performing unethical acts. The attorney advised her that he would make the recommendation for the approval of the reduced work schedule, and it is undisputed that the claimant would have remained and worked on the job if she had been granted this reduced work time request. There is disputed evidence with respect to whether or not the claimant was informed that approval for the reduced time would be granted.

Following this conversation, the claimant completed additional work on the Koller case on that day, and returned to the employer's offices on the following day when she participated in the staff Christmas party. However, the claimant did not return to work after December 21, 1982, nor did she advise the company she was quitting her job at that time. Instead of reporting to work on December 22, 1982, the claimant engaged in a series of telephone calls with counsel for the defendant in the Koller case during which she discussed the case in general and responded to many questions posed to her on this litigation. The claimant decided to resign her job on December 26,

1982, and she notified a paralegal for the employer's firm. During this conversation she reported her contacts with an individual that was involved in assisting the defendant in the litigation. Upon being notified that the claimant was quitting, her supervisor-attorney, Nicholas R. Allis, and an investigator, visited the claimant at her home on December 27, 1982. During this meeting, which was tape recorded, the claimant volitionally signed a declaration to the effect that the defense in the Koller litigation was attempting to have her sign a statement reporting that Mrs. Koller stated she had not taken Bendectin, the drug in question. In her declaration under penalty of perjury, she asserted that she had refused to sign such a statement because it was not true and that she had been under a great deal of pressure to disclose case information to the defense investigator that had met with her. Shortly prior to submitting this declaration to the employer, the claimant had researched Federal perjury and confidentiality statutes. However, during the course of the unemployment insurance appeals proceedings the claimant recanted this declaration which was submitted to the employer. She explained that she provided the declaration under penalty of perjury in order to "save the Koller case." It is the claimant's contention that the principal and paramount reason for leaving her job was her belief that the Koller case was fraudulent and that she felt it was morally wrong to participate in the preparation of the litigation.

Prior to working for the most recent employer, the claimant was a legal secretary for another attorney. During that period of employment she acknowledges that she secured the social security number of an office client from her employer's file and provided it to a husband in order to assist him in securing employment, as he did not have an authorized social security number. Additionally, her employer represented a husband in a divorce action. During her employment the claimant telephoned the opposing counsel in that matter and advised him that the husband had secreted assets. Shortly following her separation from the most recent employer, the claimant was provided an expensive apartment valued at more than $650 a

month, a rental car for three months and other assistance by someone other than the most recent employer. The claimant testified that she does lie and has difficulty in "keeping her lies straight."

REASONS FOR DECISION

• • • • She acknowledges lying in the past and it must be concluded that her testimony is unworthy of belief when in dispute or contradicted by that of the employer (Evidence Code section 780, *supra*). • • • •

Furthermore, the claimant had been promised a bonus and she remained at work until after she received the equivalent of one-month's salary for having performed diligently on the Koller case. The claimant did not act as a reasonable person genuinely desirous of retaining her employment in summarily quitting her job with essentially no notice whatsoever to the employer. Rather, the claimant entered into negotiations with the opposing counsel before giving notice to the employer of her intent to quit. Having made contact with the opposing counsel, she chose to "throw her lot" in with the defense for personal and noncompelling considerations. • • • •

DECISION

The Department determination and ruling are affirmed. Benefits are denied. The employer's reserve account is relieved of benefit charges.

/s/ S. KATZ
S. Katz
Senior Administrative Law Judge

Excerpts from Deposition of Larry J. Larsen
Held on September 15, 1983

LARRY J. LARSEN, called as a witness by the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Butler

[267] • • • • Q. She said: "How about you guys bribing me? How about a bribe?" A. I believe it was something to that effect.

[268] Q. But because she had a smile on her face, you didn't believe her? A. It was a comment sort of made in jest. • • • •

[269] • • • • Q. Nobody said "No," did they? Nobody said "No"? A. I believe that "No" was said. I might have said it. Somebody else might have said it.

[270] Q. You said "No" to her jocose remark? You took it seriously enough that you had to say "No"; is that it? A. No. I think that the point was we wanted to make certain there was no misunderstanding. • • • •

Excerpts from Plaintiffs' Motion for Stay of All Proceedings
Dated January 11, 1984

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

MOTION FOR STAY OF ALL PROCEEDINGS PENDING RESOLUTION OF THE APPEAL FROM THE ORDER DISQUALIFYING PLAINTIFFS' ATTORNEYS

• • • •

3. Plaintiffs will be deprived of counsel of their choice with respect to any proceedings which now take place or with

respect to any trial that proceeds, if a stay is not granted. Mrs. Koller has worked closely with the Butler law firm. She has stated in previous affidavits and again states in her affidavit attached to these papers, that she would like the Butler firm in the person of Mr. Butler and Mr. Allis to represent her interests and try the case for her and her small child who has no arms or legs. • • • •

Affidavit of Cynthia M. Koller Dated January 10, 1984
Annexed to Plaintiffs' Motion to Stay All Proceedings

United States District Court
for the District of Columbia

(Caption Omitted in Printing)

• • • •

AFFIDAVIT OF CYNTHIA M. KOLLER

Cynthia M. Koller, being duly sworn, hereby deposes and says:

1. I am the mother of Anne Elisabeth Koller.

2. As I have previously testified, the allegations of Krystyna Janowski are false. I ingested Bendectin during the critical period of my pregnancy in late September and in October 1978. I have never told or suggested the contrary to any one including Krystyna Janowski. • • • •

6. The law firm of Butler, Jefferson, Dan & Allis, and specifically Mr. Nicholas Allis and Mr. James Butler, are the attorneys I chose to represent my child, Anne Koller, in the litigation against Richardson-Merrell. While other attorneys who have appeared in the case have faithfully worked on the case, and specifically Mr. Allen Eaton and Mr. David Allen contributed to certain aspects of the litigation, the attorneys

who have been my principal attorneys and the attorneys who I have selected to try the lawsuit were Allis and Butler. I have had little or no contact with the Cohen and Kokus firm regarding this litigation except as reflected in my deposition. I believe that this court should not interfere with my choice of counsel for my child. I believe that pursuit of the lying accusations of Krystyna Janowski has taken the focus of the lawsuit away from the real issue and that is whether Bendectin and its components alter the growth and development pattern of a child and specifically whether Anne Koller is one of those children. • • • •

/s/ CYNTHIA M. KOLLER
Cynthia M. Koller

Sworn to before me this
10th day of January 1984.

/s/ VICKI HICKMAN
Notary Public

September 19, 1987
My Commission Expires

Transcript Excerpts From Testimony of Krystyna Janowski, California Unemployment Insurance Appeals Board, *In the Matter of Krystyna Janowski*, LA 7567 dated May 25, 1983, P.M. Session*

CLAIMANT KRYSTYNA JANOWSKI, having been first duly sworn, was examined and testified as follows:

Cross-Examination by Mr. Dan

• • • •

[79] *Q.* Have you testified in the past that you have invented a web of lies in regard to the Koller situation? *A.* Yes.

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* This transcript material was submitted to the District Court after the conclusion of the hearings on the Court's Order to Show Cause and after the Court's January 6, 1984 Order disqualifying the Butler firm. It was submitted to the Court in the form of exhibits in support of Plaintiffs' Reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion for a Stay.

Q. Have you testified that when you're angry you say some very angry things? *A.* Yes.

Q. Did you invent lots of things in regard to the Koller case, in re you said—withdraw the question.

Did you invent an entirely fictitious individual by the name of Sanchez? *A.* Yes, I did.

Q. And did you use this fictitious individual by the name of Sanchez as being the sort of evil person in the eyes of the drug company who was importuning you to do all these dastardly deeds? *A.* Yes.

Q. And you told and lied to Mr. Daum about Mr. Sanchez, didn't you? *A.* All this was done to help the Butler firm.

Q. Did you lie to Mr. Daum about the Koller case? *A.* Yes.

[80] *Q.* Did you lie to Mr. Allis about the Koller case? *A.* Yes.

Q. Did you lie to Mr. Dan about the Koller case? *A.* Yes.

Q. Did you lie to Mr. Floyd Humphries, the firm's investigator, about the Koller case? *A.* Yes.

Q Did you lie to Mr. Richard Coleman, the lawyer hired to represent the firm about the Koller case? *A.* I hardly spoke to him, but, yes, I did.

Q. You called him up on the phone and you told him that this affidavit, Exhibit No. 3, was true, didn't you? *A.* Yes.

Q. And Mr. Richard Coleman was past president of the L. A. County Bar Association? *A.* And I was aware of that.

Q. And you called him and you told him a lie, didn't you— *A.* Yes.

Q. —or the statement is true; right? *A.* Yes.

Q. Now, you also lied to a Mr. Canales—withdraw that.

Did you tell a Mr. Canales (phonetic) that the statement, Exhibit No. 3 here, was true? *A.* William Canales, yes. I remember talking with him.

Q. And you knew he was a retired FBI investigator? *A.* Former FBI agent, something like that.

Q. You liked Mr. Daum all the time you've known him? *A.* Yes.

[81] *Q.* He was one of your great confidents in the firm? *A.* Sort of everybody's big brother.

Q. And you told him that this Exhibit 3 that you signed under penalty of perjury was true, didn't you? *A.* Yes, I think I did. I really don't recall clearly.

Q. And you told Mr. Allis, the person you characterized I believe as Robin Hood, that your statement was true, didn't you? *A.* Yes.

Q. Did you make—you've testified you make things up, don't you? *A.* Yes. Well, if I'm lying, obviously I'm making things up.

Q. You testified that you invent things, don't you? *A.* I don't recall using the word, invent. I have invented things in my life to my great regret.

Q. You have testified, quote, I get my lies confused. It's so difficult to get them straight, unquote, haven't you? *A.* That's logical, yes. I said that.

Q. You've testified, quote, isn't it a fact, Miss Janowski—pardon me. Withdraw.

Has the following question been asked you and you gave the following answer. Quote, isn't it a fact, Mrs. Janowski, that as you said yesterday, when you tell lies you can't keep them all straight, and your answer, precisely, that's the problem I'm having now, unquote? *A.* Yes, they were questioning me about previous lies and I couldn't remember what I said to whom. • • • •

[83] • • • •

Q. Have you received some compensation of any sort—withdraw that.

Have you received any sort of compensation or remuneration from anybody besides Butler, Jefferson, Dan and Allis as set forth in these payroll records since December 22, 1982, except for your disability? *A.* I can give you an example, and you tell me whether or not that's what you're referring to.

Q. Just tell me all the forms of remuneration you've—just tell me all the forms of remuneration you've received other than as set forth in these payroll records and you've obtained from disability from December 22, 1982, on. *A.* Okay. They rented for me an expensive apartment of several hundred dollars a month, six hundred—over six hundred dollars a month for 4 months, a cardiac monitor, apnea monitor from Chem-Tec Medical Supply (phonetic) out in the valley, which funds should be eventually reimbursed through the insurance policy. They rented for me an apartment at a cost to them of $615.00 a month while I kept my regular apartment on Bixel Street.

Q. When did you first move into that apartment? *A.* Oh, gee. I don't remember. I think it was **[84]** mid-February, mid-January.

Q. Are you still there? *A.* Oh, no.

Q. When did you move out of that— *A.* April 21, 1983.

Q. And are you living at someplace now that's paid for by someone other than yourself? *A.* Now I'm living back on Bixel Street.

Q. Continue, what else. *A.* They rented a car for me in January, and the rental records will show I think I turned it in the end of March. Carl Schuck will have that information from his credit cards.

Q. What else? *A.* When I was testifying in the deposition I bought—I sent my mother an airplane ticket that I paid for, and she came to babysit during the extended lengthy deposition. Afterwards Schuck asked for and obtained authorization to reimburse me that cost because they felt that it was an imposition on me to provide for childcare when the deposition was being taken at their request.

Q. Now, you understand that the monies that are being paid for in all of these respects are monies that are either coming from Richardson-Merrell or Dow Chemical or from their insurance carrier? *A.* I didn't know that at the time, but I do know that now as we sit here.

Q. And you've had lawyers appearing for you at least say over 40 hours of proceedings both in this office and their **[85]** offices? *A.* Aware of attorney's fees. I'm aware of well over 100,000.00 to the Overton, Lyman firm hired by Judge Walsh back east. I'm aware of that.

Q. Judge Walsh, Louis Walsh, is a retired judge who works for the drug company, doesn't he? *A.* Well, he's counsel of record.

Q. Lawrence Walsh? *A.* Yes.

Q. Now, what you're saying, it's your understanding more than a hundred thousand dollars has been paid on your behalf authorized by Judge Walsh for legal expenses? *A.* Fees, expenses, whatever.

Q. Have you sort of been given a carte blanche in this regard?

MRS. WHITSON: Objection, Your Honor.

MR. DAN: I'm asking for her understanding.

ALJ: Just—

CLAIMANT: I have no understanding.

ALJ: Repeat the question.

MR. DAN: I'll withdraw it. It's no problem, Your Honor.

Q. Besides the remuneration we're talking about now, and about apartments, airline tickets, car rental, medical insurance, et cetera, any other form of remuneration? *A.* Yes. Let me think. The car, the apartment—oh, **[86]** yes. In February I attempted to convert my group policy from Prudential over to a private policy and they advanced a check, a cashiers check or

a company check in the amount of approximately $1500.00 made out to the Prudential Company, which I turned over to Cindy Fisher (phonetic). That was to be a quarter premium for me and my daughter's major medical care.

Q. What is your understanding as to how long that insurance will be for your medical— *A.* That is cut off. I have applied for Medi-Cal. I have not had a decision on it yet.

Q. You were provided conversion privileges under the Prudential policy with the firm, were you not? *A.* Jim Butler made a special effort to make sure that I would take steps to keep that plan, or at least know of the opportunity.

Q. You could? *A.* Yes. He brought up the subject to my attorney so that I would not lose my insurance privileges in spite of everything that had happened.

Q. So the firm hasn't done anything in regards to your insurance that you consider inappropriate, do you? *A.* No, they have gone out of their way to make sure I have an opportunity to convert to private coverage.

Q. Any other source of compensation or remuneration that you've accepted since December 22, 1982? *A.* I don't know if the firm knows about some of these things or not.

Q. I'm asking you. **[87]** *A.* Funds come to me, I don't ask any questions. I just take the check and cash it.

Q. Go ahead. *A.* I received a check in the mail from the Prudential Insurance Company. My insurance policy works like this.

Q. Wait, wait. Is this medical insurance? *A.* No. Someone has apparently been paying my medical bills and then I am being reimbursed. I don't know who's doing it. I thought maybe Nick might be paying the baby's bills because she's named after him. Her name is A-L-L-I-S, and I thought perhaps Nick is paying them. And then of course the insurance is reimbursing all these thousands of dollars. Then it occurred to me maybe Carl Schuck is paying or Judge—retired Judge

Walsh. In any event, the money is coming to me. I'm getting these checks in the mail.

* * * *

Q. You have been receiving monies from Prudential as, [88] quote, reimbursement, quote, for your child's medical bills; is that correct? *A.* Yes.

Q. Directly from Prudential? *A.* Yes.

Q. And how much have those checks totaled, approximately? *A.* Okay. The first check I got—

Q. Just how much. *A.* Both checks, $3,000.00.

Q. And you're saying at the same time you have received monies—withdraw that.

Are you saying at the same time the hospital, the physician, whoever it was, was being paid by an unknown source? *A.* Well, I'm sure the physician—no. What I'm saying is the way my policy works, the physician is paid, an application is made to the insurance company for reimbursement. Now, I don't know who has been paying these bills. All I know is that Prudential is sending the reimbursement checks to me.

Q. Somebody is paying the doctors and the hospital and at the same time you're getting the reimbursement checks from Prudential; is that correct? *A.* That's right.

* * * *

Order of the Court of Appeals Staying All Proceedings and Setting Expedited Consideration Filed January 27, 1984

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 80-1258

No. 84-5039

ANNE ELISABETH KOLLER, et al.,
Appellants

v.

RICHARDSON-MERRELL, INC.,
Appellee

Before:

ROBINSON, *Chief Judge*; WALD* and
SCALIA, *Circuit Judges*

ORDER

On consideration of appellants' emergency motion for stay of proceedings pending appeal of order disqualifying certain trial attorneys and request for expedited consideration of appeal, and of appellee's opposition thereto, it is

ORDERED by the Court that appellants' motion is granted and further proceedings in the District Court are stayed pending further order of this Court, and it is

FURTHER ORDERED by the Court that appellants' request for expedited appeal is granted and the Clerk is directed to schedule argument during the March 1984 sitting period of the Court.

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* Circuit Judge Wald did not participate in this order.

The following briefing schedule shall apply with no extensions of time to be granted:

Appellants' brief	Served and filed —February 6, 1984
Appellee's brief	—February 22, 1984
Reply brief and joint..... appendix	—March 1, 1984

All briefs are to be personally served upon counsel

Per Curiam

Letter of James Butler to Morton Mintz
Dated January 28, 1983*

BUTLER, JEFFERSON, DAN & ALLIS
Attorneys and Counselors at Law
626 Wilshire Boulevard, Suite 914
Los Angeles, California 90017

(Letterhead Abbreviated in Printing)

January 28, 1983

Morton Mintz
The Washington Post
1150 15th St. N.W.
Washington, D.C.

Re: Bendectin

Dear Mr. Mintz:

Enclosed herewith is a copy of a letter I sent today to the Commissioner of the Food and Drug Administration, Arthur

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* This letter is not a part of the District Court record herein. It was included for the first time by appellants in the joint appendix filed with the United States Court of Appeals for the District of Columbia Circuit.

Hull Hayes, together with a copy of the questionnaires. I am also enclosing a copy of a release for publication signed by each of the parents. I have known and admired your articles ont he [sic] drug industry and I though [sic] that these might be of particular interest to you. If you have any questions, I will be in Washington, D.C., from Sunday on at the River Inn. I also will be in court on the Koller case before Judge Norma Johnson on January 31 from 10:30 a.m. on. I appreciater [sic] your continuing interest.

Very truly yours,

BUTLER, JEFFERSON, DAN & ALLIS

/s/ JAMES G. BUTLER
James G. Butler

JGB:fl
Encls.

Order of the Supreme Court Allowing Certiorari
Dated October 15, 1984

RECEIVED—Oct 15 1984
Office of the Clerk, Supreme Court, U.S.

SUPREME COURT OF THE UNITED STATES

No. 84-127

RICHARDSON-MERRELL, INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, etc., et al.

ORDER ALLOWING CERTIORARI. Filed *October 15, 1984.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the District of Columbia Circuit* is granted.